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No. 92

IN THE SUPREME COURT
OF THE UNITED STATES

October Term 1991

ANDREW E. SMYTH
Petitioner

vs.

HAYMOND GIPSON
MARLENE GIPSON
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL SECOND APPELLATE DISTRICT

DAVID A. SMYTH, ESQ.
5225 Wilshire Blvd.
12th Floor
Los Angeles, CA 90036
(213) 933-8401

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QUESTIONS PRESENTED

1. What are the minimum standards required by the due process clause of the 14th Amendment for an award of punitive damages; and does California's Jury Instructions and standards for post-trial review meet these minimum standards?

2. Does due process protection extend to other areas of civil litigation in which trial courts and appellate courts are granted standardless discretion; and if so, does California's standards for reviewing intentional misconduct of opposing counsel allow reviewing courts limitless discretion?

3. Did the trial and appellate court so vary from judicial norms as to warrant review by this Court in exercise of its supervisory function?

LIST OF PARTIES

PETITIONER
ANDREW E. SMYTH

RESPONDENTS
HAYMOND GIPSON
MARLENE GIPSON

These parties are identical to those in the proceedings below.

RULE 29.1 LIST

The following constitutes a list of all parent companies and affiliates of Petitioners.

The Law Offices of Andrew E. Smyth is not incorporated.

Andrew E. Smyth has one partner, DAVID A. SMYTH, and does business under both the name, SMYTH LAW OFFICE and SMYTH & SMYTH.

RULE 29.4(C) NOTICE

28 U.S.C. §2403(b), which provides for notice to and intervention by, a state where the constitutionality of a state statute is drawn into question in a federal court, may be applicable in the case at bench.

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IN THE SUPREME COURT
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OCTOBER 1991

ANDREW E. SMYTH
Petitioner

vs.

HAYMOND GIPSON
MARLENE GIPSON
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL SECOND APPELLATE DISTRICT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal, Second Appellate District, filed August 27, 1991.

OPINION AND ORDERS BELOW

The opinion of the California Court of Appeal was ordered by that court not to be published and is reproduced in Appendix A, _infra_. That court's order denying rehearing is unreported and is reproduced in Appendix B, _infra_. The November 13, 1991 Order of the Supreme Court of California denying discretionary review is unreported and is reproduced in Appendix C, _infra_.

JURISDICTION

The opinion of the California Court of Appeal was filed on August 27, 1991 (Appendix A). On September 10, 1991, the California Court of Appeal denied Petitioner's timely petition for rehearing (Appendix B). On November 13, 1991, the Supreme Court of California declined to grant discretionary review in the case at bench (Appendix C). This petition was timely filed within ninety (90) days of that date. 28 U.S.C. §2101(C); S.Ct.R. 13.1. The jurisdiction of this Court to review the judgment of the California Court of Appeal by writ of certiorari is conferred by 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The due process clause of the 14th Amendment to the United States Constitution provides in pertinent part:

> ". . . nor shall any state • deprive any person of . . . property, without due process of law . . . ."

STATEMENT OF THE CASE

The Gipsons alleged in a legal malpractice and fraud case that Attorney Andrew E. Smyth had mishandled their Chapter 13 and as a result they lost their house.

Andrew E. Smyth was found liable for $250,000.00 in non-economic damages (punitive and emotional harm) for failing to give admittedly speculative advice in a difficult situation. This verdict was returned despite a total failure of proof. No one testified that the Gipsons would have had a better result had ANDREW E. SMYTH (hereinafter referred to as "SMYTH") acted differently.

This result came about because of the standardless nature of California's punitive damage law. This result also came about because of intentional misconduct by Respondents' attorney[1] and the lack of standards in California law to prevent or correct such misconduct.

The paragraph above presents two questions left unresolved by this Court's decision in Pacific Mutual Life Ins. Co. v. Haslip (1991) 111 S.Ct. 1032:

First: What are the minimum due process standards for the award and review of punitive damages?; and

Second: Does the ruling in Pacific Mutual Life Ins. Co. v. Haslip supra at 111, S.Ct. 1032, extend to other areas of state civil litigation where judges and/or juries are granted standardless discretion?

---

[1] (Two incidents of improper communication with jurors and a false claim to possess an $85,000 tax appraisal.)

The California Court of Appeal reviewed the trial. The Opinion filed by that court misstated numerous undisputed facts and failed to apply mandatory law to such an extent as to justify review by this Court under Supreme Court Rule 10.

A. The Parties.

Petitioner, SMYTH, is an attorney practicing law in the State of California.

Respondents, HAYMOND GIPSON and MARLENE GIPSON are residents of the State of California.

B. Statement of Facts.

The GIPSONS hired SMYTH on May 29, 1984 (R.T. p. 333; APR p. 12)*. At that time, the GIPSONS were in a Chapter 13 filed by another attorney (R.T. p. 92; APR p. 12). In this Chapter 13, the GIPSONS had agreed to an order that they would make each mortgage payment commencing November 15, 1983. (Trial Appendix 80-84; APR 21), (hereinafter referred to as the November 1983 Stipulated Order). This Order gave the lender, Great Western Savings & Loan the right to lift the stay and continue foreclosure proceedings against the GIPSONS' home on 43rd Street, Los Angeles, California, upon one more missed payment.

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* APR = Appellant's Request for Rehearing

On the day the GIPSONS hired SMYTH they had made only one out of seven payments due under the November 1983 Stipulated Order (R.T. pp. 340-341; APR p. 21). A hearing was set the day after the GIPSONS hired SMYTH on Great Western Savings & Loan's motion to lift the stay. This motion was based on the GIPSONS' default under the November 1983 Stipulated Order. On the next day, the GIPSONS could make no payments (R.T. p. 340; APR p. 21; therefore, the stay was lifted (R.T. 340, 341; APR 21). It was agreed that the GIPSONS would get thirty (30) extra days in the foreclosure process (R.T. pp. 340, 341, 354, 355; APR 21).

Contrary to the Court of Appeal Opinion (hereinafter referred to as "the Opinion"), no expert testified that there were opportunities to set aside the November 1983 Stipulated Order at the May 30, 1984 hearing (Opinion, p. 23, 25, 26). Respondents never claimed this in their brief and never described any other possible defenses that existed on May 30, 1984.

Respondents' expert said it was very unlikely that the November 1983 Stipulated Order could be set aside.

> "A. By Mr. Harriton:
>
> . . . [I]t was extremely unlikely that . . . their counsel would be successful in modifying the stipulation . . . ."

R.T. p. 539; APR p. 8.

Three months later (not two days later as indicated in the Opinion) SMYTH filed another Chapter 13 (number two) for the Gipsons (Opinion, p. 7, but see Trial Appendix, p. 119 and R.T. pp. 333, 337; APR p. 17). SMYTH testified that a new confirmation under this new filing would supercede (or set aside) the November 1983 Stipulated Order under the provisions of 11 U.S.C. §1327[1] (R.T. p. 350; APR p. 9.) SMYTH testified he had accomplished this result before (R.T. p. 359; APR p. 9). (See, In Re Flick (1981) 14 B.R. 912, where a prior stipulated order was superceded by a confirmation.[2]

---

[1] 11 U.S.C. §1327 states:

> "The provisions of a confirmed plan bind the debtor and each creditor . . . whether or not such creditor has objected."

This second Chapter 13 was not a copy of the GIPSONS' first Chapter 13 as the Opinion stated on page 8. (All numbers were different and considerably higher -- compare Trial Appendix 61-69 with Trial Appendix pp. 119-128; APR p. 17). The GIPSONS made two out of three mortgage payments which were due before the confirmation date set for this second filing. (See Trial Appendix pp. 142, 174; APR p. 12 -- the September 1984 and October 1984 payments were made.) The GIPSONS also made one out

---

2. The Court of Appeal states that SMYTH was depending on "extreme long shots" based on a novel combination and reinterpretation of legal precedents (Opinion. p. 14) to save the GIPSONS' home. This describes SMYTH's testimony on how to get the house back after foreclosure (R.T. pp. 428-430; APR 19). Preventing foreclosure only required that a plan be confirmed before relief from stay was again requested (R.T. p. 359; APR p. 19).

of three Chapter 13 plan payments (meant to cure arrearages) to the Chapter 13 Trustee before the December 3, 1984 confirmation date (R.T. 300, 365, 728; APR 12). Because of the lack of payments, this second Chapter 13 was dismissed (R.T. pp. 300, 365, 728; APR p. 12).

The Opinion states that SMYTH did not tell the GIPSONS to make mortgage payments before the confirmation hearing (Opinion p. 8). However, the Opinion does not mention that the GIPSONS never said they did not understand the payment requirements - and many times stated they did understand (R.T. pp. 94, 96, 113, 169, 170, 180, 203, 207, 219; APR p. 13). The GIPSONS made mortgage payments before every confirmation hearing -- just not enough (APR p. 13).

SMYTH filed another Chapter 13 (third) for the GIPSONS on December 11, 1984. This Chapter 13 was dismissed at a confirmation hearing on January 28, 1984 because the GIPSONS had made only two more mortgage payments when three had become due (R.T. pp. 297, 300, 301, 328; Trial Appendix 142-147, 219-224; APR p. 12).

SMYTH did not file the GIPSONS' fourth Chapter 13 until three months later. (AOB p. 50; APR p. 12.) See, In Re Chisum (9th Cir. 1988) 847 F.2d 597; fourth filing proper if done in good faith.

During this three months the GIPSONS had an appraiser come to their home and either considered sale or put their home up for sale (R.T. p. 830 -- testimony (deposition) of MARLENE GIPSON; APR p. 13).

The Court of Appeal is incorrect when it states "The GIPSONS never attempted to save the equity in their home through sale or refinance", Opinion p. 29 -- there is no such testimony.

On May 3, 1985, SMYTH filed a fourth Chapter 13 for the GIPSONS (Trial Appendix p. 160; APR p. 12).

On June 12, 1985, the stay was lifted because of the continuing default in the November 1983 Stipulated Order. On June 17, 1985, the GIPSONS had made enough payments to have a Chapter 13 plan confirmed and it was confirmed. SMYTH testified that the reason the plan was confirmed was to keep the jurisdiction of the bankruptcy court to possibly grant further relief. (See, In Re Worcester 83 28 B.R. 910, where the same bankruptcy judge as assigned to the GIPSONS set aside a foreclosure sale in a Chapter 13 case.) However, 11 U.S.C. §1327 could not be used to prevent lifting of the stay on June 12, 1985 -- the new plan had not been confirmed.

On July 23, 1985, the GIPSONS' house was sold at foreclosure sale (Trial Appendix, p. 190). The amount of encumbrances against the property (which were not disputed by the parties) on July 23, 1985 was $43,000.00. (AOB pp. 6-7; APR p. 18). The encumbrances of record (County Recorder) totalled $48,591.81 (AOB p. 6; APR p. 18). Great

Western Savings & Loan's appraiser testified the GIPSONS' house was worth $52,000.00 (R.T. p. 586; APR p. 18) while HAYMOND GIPSON said other houses in the neighborhood sold for $88,000.00 to $90,000.00 (R.T. p. 158). (The highest value listed in the GIPSONS' Chapter 13 schedules was $60,000.00. (Trial Appendix p. 160.)

HAYMOND GIPSON testified he was not informed that the foreclosure sale had occurred (R.T. p. 135).

However, HAYMOND GIPSON also testified:

> "Q. Were you told at that time when you presented that lawsuit to SMYTH'S office that the office would not be representing you in that unlawful detainer?

> A. (By HAYMOND GIPSON) -- He
> did say, 'There was nothing
> he could do.'"

R.T. p. 184; APR p. 17.

Therefore, the Court of Appeal is incorrect that SMYTH told GIPSON that SMYTH would "take care of it" everytime HAYMOND GIPSON brought something in. (Opinion p. 13.)

HAYMOND GIPSON said that on the day he was evicted he thought he was protected by Chapter 13 (R.T. p. 148).

SMYTH testified that because of low equity, sale or refinance was not possible (R.T. pp. 347, 350, 353.)

The trial court granted a motion to bifurcate under Civil Code Section 3295 (Trial Appendix 16-27). However, the parties submitted the issue of punitive damages in only one verdict form. (Trial Appendix p. 233.)

The jury returned a verdict in respondent's favor awarding $50,000.00 for negligence, $100,000.00 for fraud, and $150,000.00 for punitive damages. The Appellate Court found that the $100,000.00 award was most probably for emotional harm (Opinion p. 57-58). The highest claim of economic loss by respondents at trial was $50,000.00 (R.T. p. 159).

Appellant filed a Petition for Rehearing (hereinafter APR) which was denied, correcting many errors in the Appellate Court Opinion. Respondents did not object. The errors concerned matters upon which the parties agreed.

C. The Proceedings Below.

On March 10, 1988, respondents filed an amended complaint for legal malpractice and fraud (i.e., concealment of the malpractice). No specific acts (other than failure to file correct paperwork) were alleged in this complaint. (Trial Appendix, p. 1.)

The Complaint generally presented a claim that Petitioner had mishandled Respondents' Chapter 13 case and as a result, Respondents lost their home through foreclosure (Trial Appendix 1).

This case was tried before a jury in October 1989. The jury returned a verdict for $50,000.00 for negligence, $100,000.00 for fraud and $150,000.00 for punitive damages. (Trial Appendix, p. 236.)

Petitioners moved for judgment notwithstanding the verdict and for a new trial. These motions were denied. (Trial Appendix, p. 601.)

D. Presentation and Decision of the Federal Constitutional Questions.

1) Concerning the Lack of Due Process Standards for an Award of Punitive Damages.

Petitioner did not advance the due process argument concerning punitive damages in the trial court.

Petitioner did advance this argument in the Appellate Court in Appellant's Petition for a Rehearing (hereinafter "APR") citing Pacific Mutual Life Ins. Co. v. Haslip (1991)

111 S.Ct. 1032 - decided after initial briefs had been filed. See, APR p. 18. Petitioner also advanced this argument in a Petition for Review filed with the California Supreme Court.

However, Petitioner was not required to advance this argument in the lower California courts. It would have been futile to do so. California courts have rejected due process challenges to its due process laws. See, Bertero v. National General Corp. (1974) 13 Cal.3d 43, 66 and Grimshaw v. Ford Motor Co. (1981) 119 Cal.App.3d 757, 811.

See, Moradi-Shalal v. Fireman's Fund Ins. Cos. (1988) 46 Cal.3d 287, 292, a defendant was not required to raise the issue in the lower courts because "clearly it was pointless for defendant to ask either the trial or appellate court to overrule one of our decisions."

2) Concerning the Lack of Due Process Standards for the Review of Intentional Misconduct.

Petitioner asserted in the trial court that he had not been afforded a fair trial. Trial Appendix p. 387-390. Petitioner did not frame this argument in the form of a denial of federal due process standards.

Petitioner did advance a due process argument in the California Appellate

Court - claiming that the denial of the appearance of a fair trial was a denial of due process -- see, Appellant's Reply Brief where federal cases are cited on pages 33-34. This section was meant to apply to both the jury tampering and the false statement to the jury. And it was understood to so apply by the California Court of Appeal (Opinion, pp. 38-45).

Petitioner did indicate in his petition for review to the California Supreme Court that the standard for assessing improper contact with jurors in civil cases was unclear. See, Petition for Review, p. 22. Petitioner did not assert that the standard for reviewing a false claim made to a jury (regarding the $85,000.00 appraisal) was unclear. The Federal Constitution was not mentioned in the Petition to the California Supreme Court in regard to the review of the misconduct. However, Petitioner did assert he was afforded inadequate review by the lower courts (Petition for Review to California Supreme Court, pp. 22-24) on the issues of attorney misconduct.

This Court is requested to find that this specific issue is not waived because it is within the "clear intentment" of the argument Petitioner has made continuously since the verdict. See, Braniff Airways, Inc. v. Nebraska

Board of Equalization & Assessment (1954) 347 U.S. 590, 598-599; 74 S.Ct. 757. The argument made in each lower court was "intentional misconduct aimed at basic rights should be presumptively prejudicial." *See*, Trial Appendix, pp. 387-390; AOB p. 24 and Petition for Review to the California Supreme Court, p. 22-24. This standard exists for Federal civil trials, *infra*; not civil trials conducted in California.

3) Concerning the Request that this Court Review the State Court's Actions Because of a Significant Departure from Judicial Norms.

Each of the items asserted in Petitioner's argument that this Court should review the actions of the trial court and appellate court, in order to exercise its supervisory function, were brought up to those courts. See, APR generally.

The nature of an argument under this Court's Rule 10.2 is such that it can only be made to this Court.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT HAS DECIDED THAT DUE PROCESS PROTECTIONS APPLY TO PUNITIVE DAMAGE AWARDS, BUT THE MINIMUM REQUIRED PROTECTION HAS NOT BEEN DECIDED.

This Court decided in Pacific National Life Ins. Co. v. Haslip (1991) 111 S.Ct. 1032, that the jury instructions and post-trial review were sufficient to satisfy due process requirements when an award of punitive damages was made.

Therefore, this Court did not decide the minimum jury guidance through instructions, or the minimum post-trial review necessary to satisfy due process.

This Court has indicated the problems associated with lack of due process protection in awards of punitive damages; and has mentioned possible detrimental effects on society of excessive punitive damages awards. A decision setting out minimum due process standards is still needed.

California law on punitive damages is deficient on due process grounds in every area discussed in Pacific Mutual Life Insurance Co. v. Haslip (1991) 111 S.Ct. 1032. See, Due Process, Punitive Damages and Civil Procedure: Does California Law Pass Constitutional Muster?, by Bayard F. Berman, in the Beverly Hills Bar Association Journal, Vol. 25, No. 4, Fall 1991. In this article, California law is compared with Alabama law at each stage of the proceedings (see, Argument, infra) and found deficient. The case at bench illustrates the deficiencies in California law. In California, there is no mandatory factual element that a jury must find to award punitive damages. Therefore, there is no possibility of effective review (i.e., there is no necessary element needed to sustain an award on appeal). (See, Section II, re

Adams v. Murikami (1991) 58 Cal.3d 105.

The case at bench also illustrates the detrimental effects of punitive damages -- in this case a possible restriction on attorney help for Chapter 13 debtors.

The case at bench shows how punishing an attorney for picking one alternative (and omitting other speculative alternatives) cannot serve the legitimate purposes of punitive damages.

For these reasons this Court is respectfully requested to grant review.

II.

THIS COURT IS REQUESTED TO GRANT THE WRIT TO DETERMINE IF DUE PROCESS PROTECTIONS EXTEND TO OTHER AREAS OF CIVIL LITIGATION WHERE JUDGES ARE GRANTED STANDARDLESS DISCRETION.

This Court has already indicated that the due process clause of the 14th Amendment does apply to civil cases. In Parratt v. Taylor (1983) 101 S.Ct. 1919, this Court found that a denial of procedural due process at the trial level can be cured by the availability of sufficient post-trial review. Pacific Mutual Life Ins. Co., supra, 111 S.Ct. at 1032, applied this ruling to the question of punitive damages. The question above arises in the case at bench in the following form:

Does California statutory or common law allow judges standardless discretion in evaluating deprivation of constitutional rights caused by intentional misconduct?

In the case at bench, Petitioner alleges that three instances of severe attorney misconduct were evaluated under state law guidelines that allowed the trial court and appellate court unlimited discretion in ruling on these claims of error.

III.

THE CALIFORNIA COURT OF APPEAL (& THE TRIAL COURT) SO FAR DEPARTED FROM JUDICIAL NORMS AS TO WARRANT REVIEW BY THIS COURT IN EXERCISE OF ITS SUPERVISORY FUNCTION.

This Court has stated that a factor favoring the granting of a writ of certiorari is the need to supervise a Court of Appeal that has varied significantly from judicial norms. Supreme Court Rule 10(1)(b). This criteria may be applied to any court whose rulings are reviewable by this Court. Supreme Court Rule 10(2).

In the case at bench, the trial court and the California Appellate Court, Second District, Division 7 (hereafter "the Appellate Court") varied considerably from judicial norms.

The trial court ignored unreported, out-of-court communications with jurors (Trial Appendix p. 420) and the trial court refused to rule on an objection to a false statement by Respondents' counsel that he possessed an $85,000.00 tax appraisal of Respondents' house (R.T. pp. 1075-76). (An $85,000.00 value indicated the possibility of sale or refinance; Petitioner's appraisal indicated no such possibility (R.T. p. 586 and Trial Appendix p. 192).

But far more extreme was the action of the Appellate Court. Mandatory authority was either arbitrarily ignored or misstated (i.e., stated in a way directly contrary to the same Appellate Panels published Opinion.)

The facts are misstated. A version of the case, with which neither party would agree is presented. Nobody involved in the judicial system, judge or attorney, should misstate facts to the degree done in this opinion. This court should exercise a supervisory function, when as here, the State Supreme Court has not done so.

Concerning the arbitrary failure to apply controlling law:

The Appellate Court stated that SMYTH stipulated to a motion to bifurcate under California Code of Civil Procedure §3295, and so waived the requirement that evidence of financial condition be presented, as required by Adams v. Murakami (1991) 58 Cal.3d 105. There was no stipulation -- and if there was, it was irrelevant -- a motion under Civil Code §3295 must be granted. Three months after the Opinion in the case at bench was filed, this same appellate panel stated the opposite conclusion as if it was obvious and uncontestable (i.e., the conclusion is that Adams v. Murikami, supra, applies to a case bifurcated under Civil Code §3295 -- evidence of financial condition is essential to support an award of punitive damages.) See, Douglas v. Ostermeier (1991) 1 Cal.App.4th 729.

The above issue, which determined one-half the award was unbriefed. Therefore, a rehearing was mandatory. Adoption of Alexander S. (1988) 44 Cal.3d 857. Petitioner's request for a rehearing was denied. (See, Appendix B.)

Facts were misstated to hide the total failure of proof in the case at Bench. No one testified sale or refinance would succeed. The GIPSONS did not testify that they had failed to try to sell or refinance. (The Appellate Court incorrectly stated that the GIPSONS had so testified, Opinion, p.29).

To show fraud the Appellate Court states as fact matters never presented at trial; and matters which neither party would assert.

The Appellate court states or implies as true:

A. That the Chapter 13's were filed after foreclosure (and so were useless -- and so SMYTH had defrauded the GIPSONS of fees, Opinion at p. 29.)

B. That the GIPSONS were unemployed when the Chapter 13's were filed (Opinion, p. 29).

C. That the GIPSONS never tried to sell or refinance their house while reprsented by SMYTH (Opinion p. 29).

D. That the GIPSONS were not told to make mortgage payments while in Chapter 13 and so did not make these payments (Opinion, p.8).

E. That SMYTH said he would "take care of" each pleading brought to him (thereby causing the GIPSONS to be unaware of the pending eviction) (Opinion, p. 13).

F. That it is "unrefuted" that SMYTH and his associate were unware of the GIPSONS' situation when the GIPSONS first hired SMYTH (Opinion, pp. 22-23).

G. That SMYTH simply copied the figures from the first Chapter 13 on the paperwork he filed (Opinion, p. 8).

H. That SMYTH grossed $1.5 million a year (Opinion, p. 67).

All of the above are false. The true state of the record is as follows:

A & B. All filings were before foreclosure and all were done while HAYMOND GIPSON was employed (AOB, pp. 9, 50).

C. The GIPSONS never testified that they were not trying to sell or refinance and MARLENE GIPSON testified they were (R.T. p. 830).

D. HAYMOND GIPSON stated numerous times he was told to make mortgage payments, including being told by SMYTH (R.T. pp. 94, 96, 113, 169, 170 180, 203, 207, 219). The GIPSONS did make mortgage payments -- just not enough (AOB p. 50). The GIPSONS came within one mortgage payment of confirming a plan on December 3, 1984

(AOB, p. 50).

E. HAYMOND GIPSON admitted that SMYTH told him that "nothing more could be done" when MR. GIPSON brought the unlawful detainer complaint to SMYTH. SMYTH did not say he would "take care of it" (R.T. p. 184).

F. SMYTH and Mr. Schneider were aware of the GIPSONS' situation -- failure to make payments required under Chapter 13 rules and under a prior Stipulated Order. SMYTH entered into an agreement with Great Western Savings & Loan concerning postponing the foreclosure (R.T. pp. 340-3441, 354-355). There is no evidence that SMYTH or Mr. Schneider were unaware of the

GIPSONS' situation.

G. SMYTH did not copy the figures from the first Chapter 13. A comparison of the first filing with the Chapter 13 filed by SMYTH shows considerably higher numbers on the second filing. (Compare Trial Appendix, pp. 61-69 with Trial Appendix pp. 119-128.)

H. SMYTH testified he received $750.00 from the GIPSONS for three Chapter 13 filings. (R.T. p. 303.) SMYTH also testified that he filed approximately 1,000 bankruptcies a year -- all chapters. Also, SMYTH testified he would have (but did not) receive $560.00 more from the GIPSONS if a plan had been confirmed (R.T. p. 303). From this the Appellate Court estimates a total fee from the GIPSONS of $1,500.00. The Appellate Court then multiples this $1,500 times 1,000 to get $1.5 million gross income (Opinion, p. 67). The correct computation is $250 per case times $1,000 or $150,000 a year gross income -- not $1.5 million. One-half the verdict is supported by an obvious error in arithmetic.

ARGUMENT

I.

THE CASE AT BENCH ILLUSTRATES DUE PROCESS DEFICIENCIES IN CALIFORNIA'S LAW ON PUNITIVE DAMAGES AT ALL STAGES OF THE

PROCEEDINGS: CERTIORARI SHOULD BE GRANTED TO DECIDE MINIMUM DUE PROCESS REQUIREMENTS FOR PUNITIVE DAMAGES -- A QUESTION NOT RESOLVED BY PACIFIC MUTUAL LIFE INS. CO. v. HASLIP (1991) 111 S.Ct. 1032.

A. California's Punitive Damages Law Allows Jurors to Punish a Defendant in Any Amount Subject to No Guidelines and so Violates the Due Process Clause of the 14th Amendment.

Under California law no proof of any factual element is required to be introduced at trial to show initial entitlement to punitive damages. And necessarily, therefore, there can be no meaningful post-trial review of the sufficiency of the "facts" supporting an award.

Jurors are asked to find "fraud, oppression or malice," Civil Code

§3295. But these are descriptive terms not directions to find specific facts and so are inadequate.

Once entitlement to punitive damages is decided the jury is given only other descriptive terms as guidance as to the amount to award.

The jury is told (and was told in the case at Bench):

> "The law provides no fixed standards as to the amount of such punitive damgaes . . . ."

R.T. p. 1144.

Descriptive words such as, "reprehensibility" or "reasonable relation" provide no guidance.

> "Conduct which one person may view as outrageous another may accept without feeling . . . ."

Devlin v. Kearney Mesa AMC/Jeep/Renault, Inc., 155 Cal.App.3d 381, 388; 202 Cal.Rptr. 204.

As the debates on abortion, or the death penalty indicate, one person's "good public policy" may be another's "reprehensible conduct."

Authorities cited in Pacific Mutual Life Ins. Co. v. Haslip (1991) 111 S.Ct. 1032, describe punitive damages as either:

> ". . . [A] monstrous heresy." or
>
> ". . . [A]n outgrowth of the English love of liberty. . . ."

Pacific Mutual Life Ins. Co. v. Haslip (1991) 111 S.Ct. 1032, 1038, quoting other authorities.

Both as regards the initial finding of entitlement and the finding of the amount of damages, California law asks the jurors to only *consider* inadequate descriptions. (R.T. at p. 1144.)

A comparison with Alabama's jury instructions as described in *Pacific Mutual Life Ins. Co. v. Haslip*, *supra*, indicates the deficiency in California's jury instructions.

Alabama's instructions expressly tell the jury that punitive damages *are* not meant to compensate the plaintiff for any injury. California's instructions do not. *See*, R.T. pp. 1143-1144. As a result the jury in the case at bench based the award of punitive damages on an amount meant to compensate, i.e., the amount necessary to buy the GIPSONS a new house. *See*, Trial Appendix, pp. 412-415, 417. Alabama's instructions tell the jury that they:

> "[M]ust take into consideration the character and degree of the wrong as shown by the evidence and necessity of preventing similar wrong."

Pacific Mutual Life Ins. Co. v. Haslip, _supra_, 111 S.Ct. 1032, 1044.

California's jury instruction (given in the case at bench) only tells the jury they are to consider the reprehensibility of the defendant's conduct and that there are no fixed standards. (R.T. pp. 1143-1144.)

The danger from this directionless law is particularly great to a defendant charged with fraud by concealment as in the case at bench.

The jury in the case at bench found fraud before reaching the question of punitive damages. (Trial Appendix at p. 478.)

The instructions listed _specific elements_ the jury needed to find for fraud (Trial Appendix, pp. 315-318).

One of these elements was "intent".

However, this "intent" was only intent that the plaintiffs change their position -- not intent that the plaintiffs be harmed. No "evil motive" is required for this type fraud (See, Trial Appendix pp. 315-318).

B. The Case at Bench Illustrates How Large Punitive Damages Can be Awarded Without Any Evidence of Wrongdoing; & Further Illustrates the Counter-Productive Effects of Punitive Damages Awarded in the Absence of Wrongdoing.

In the case at bench, Petitioner, an attorney, was found liable for punitive damages for recommending subsequent Chapter 13 filings to prevent foreclosure and for not recommending sale or refinance.

Yet, Respondents' own expert said he would have filed a Chapter 13 for the GIPSONS (R.T. p. 711) and this same expert stated he would not have recommended sale (R.T. p. 687) and was unsure if refinance would succeed. (R.T. p. 543.)

So Petitioner was found liable for fraud for failing to recommend (i.e., concealing) alternative advice; advice that no one testified would succeed. The non-economic damages were $250,000-$150,000.00 punitive - $100,000 for emotional harm (Trial Appendix p. 478).

This severe punishment (about 50% of Petitioner's net worth) (Opinion at at p. 70) was exacted for conduct which deserves no punishment - i.e., choosing a reasonable course of action in a case in which all choices were difficult. The equity in the GIPSONS' house based on the only figures presented to SMYTH indicated that less than $5,000.00 could be realized from a sale. Also, the GIPSONS had a very low mortgage payment. See, AOB p. 6.

Therefore, a recommendation to sell does not seem to be necessarily good advice.

The award in the case at bench is a greater percentage of Petitioner's net worth than awards in recent cases heard by this Court and so is more devastating than a multimillion dollar award to a large corporation. This award is more likely to cause harm (i.e., dissuade attorneys from handling Chapter 13's) than the award in Pacific Mutual Life Ins. Co. v. Haslip, supra, 111 S.Ct. 1032. And if this award is meant to punish and deter an attorney from freely advising a client as to the availability of options, then the award will not further the legitimate purposes of punitive damages. The case at bench presents these issues well.

C. **Petitioner Would Have Benefitted From the Application of Proper Standards.**

The Alabama Supreme Court lists as factors for evaluating punitive damages the following factors: (quoted in Pacific Mutual Life Ins. Co. v. Haslip (1991) 111 S.Ct. 1032:

". . . the harm likely to result from the defendant's conduct" and

". . . the degree of reprehensibility of defendant's conduct . . ."

". . .the defendant's awareness . . ."

"the profitability (of the conduct") ($750.00 attorney's fees -- R.T. p. 303.)

"the financial position of the defendant" ($600,000 net worth. (Trial Appendix p. 427.)

"The existence of other civil awards against the defendant" (An award of $100,000 for emotional harm in the case at bench."

Trial Appendix, p. 467.

Historically, damages for emotional harm have been viewed as punitive in nature - See, Constitutional Case for Reviewing Punitive Damages, 69 Virginia Law Review at 269.

Jury instructions or appellate review guided by these factors would have benefitted Petitioner.

II.

DUE PROCESS PROTECTIONS SHOULD BE EXTENDED TO ALL AREAS OF STATE CIVIL LITIGATION WHERE JUDICIAL REVIEW IS GUIDED BY INADEQUATE STANDARDS.

"Do due process considerations impact other state civil remedies or other process granted by state common or statutory law to judges or juries to exercise in their standardless discretion?"

See, Beverly Hills Bar Association Journal, "Due Process, Punitive Damages & Civil Procedure. Does California Law Pass Constitutional Muster?", by Bayard F. Berman, Vol. 25, No. 4. The above question is asked in light of this Court's ruling in Pacific Mutual Life Ins. Co. v. Haslip (1991) 111 S.Ct. 1032.

A. California Has Inadequate Standards for Reviewing Intentional Misstatements of Counsel.

Respondent's attorney falsely claim to possess an $85,000.00 tax appraisal. (R.T. p. 1075, Opinion pp. 78, 83.)

The Appellate Court found no prejudice because equity was not the only issue as it had been in City of

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2. MR. BECK said, "One thing pops is the aspersion that was cast on me about an $85,000 tax assessment. You and I both know that when MR. HARRITON was on

-continued

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2. continued

on that stand, he was referring to a document in the deposition, and that document existed. He testified to it, so I didn't make that up." (R.T. 1075, quoted in Opinion p. 83.)

Petitioner *immediately* objected and asked for a meeting in chambers. (R.T. 1075.) This is a correct way to object under local rules. *See*, *Civil Trials Manual*, 2nd Ed. ¶58, pp. 14 & 19 - an objection should not be argued in front of the jury. The Appellate Court deemed this a waiver.

The Appellate Court also stated that it was not shown that this declaration did not exist. (Opinion, p. 80.) This is incorrect -- it was shown not to exist. *See*, Declaration of David Smyth - Trial Appendix p. 425, and *see*, Respondents' Reply Brief where Mr. Beck claimed he had never made the statement about the $85,000.00 tax appraisal. (Reply Brief, p. 14). (The relevant question is not whether it existed but was it presented in evidence.)

Los Angeles v. Decker (1977) 18 Cal.3d 860 (a condemnation case) in which a similar (though not as severe) false claim had been made in argument.

The Appellate Court could have cited a number of cases where the question of prejudice is determined by asking whether an admonition would cure (or did cure) the harm.

See, Witkin, California Procedure, Trial, No. 209, 3d Ed. 1985, for a list of many cases of misconduct ruled too severe to be cured by admonition. None of these cases give any guidelines to a reviewing court. Those courts simply describe the conduct and rule that it is too prejudicial to be cured by admonition.

There is no guidance from cases such as these where each depends on specific facts. An Appellate Court can simply point to some difference in facts (as was done in the case at Bench) to uphold a verdict. But a standard is possible.

Compare the standard set by the Oklahoma Supreme Court,

> "If counsel, in argument, . . . makes representations of facts to the jury, unsupported by any evidence, and calculated to injure the opposing side . . . this constitutes misconduct, and requires reversal unless it clearly

> appears that no injury resulted
> to the other side."

Roberts v. Lewis (Ok. 1968) 441 P.2d 350, 355.

California has no civil case stating a similar standard.

In the case at bench, value and equity, although not the only issue, was a determinative issue. SMYTH'S entire defense was based on lack of equity. See AOB, p. 6. The Appellate Court Opinion is based on the assumption of some equity. Assume little or no equity and SMYTH's advice seems to be the only possible course of action.

The Oklahoma standard would not be difficult to apply. The main question would be, "was the subject matter 'material' and contested?" In the case at bench, the Appellate Court said that equity was "critical and contested".

B. California Has Inadequate Standards for Reviewing Intentional & Secret Contact with Jurors.

The other two acts of misconduct -- concerning contact and communication with jurors should be subject to a strict and easily applicable rule:

> "Any secret communication during trial with jurors shall result in reversal."

This is the rule in the Ninth Circuit Federal Courts. See, Rinker v. County of Napa (9th Cir. 1983) 724 F.2d 1352.

California has no such ruling limiting judicial discretion to uphold verdicts possibly based on unknown out of court communications.

In the case at bench, one meeting with jurors was not discovered until after trial - Attorney Ray Bowen observed Mr. Beck conversing with three or more jurors outside of court. (Trial Appendix, p. 420). The Court of Appeal ignored this incident[4]

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[4] The Appellate Court has misstated the facts concerning the "puppy incident".

Compare the Opinion, pp. 41-42 with Juror Pullens unrefuted declaration (Trial Appendix, p. 409).

The Appellate Court did not address SMYTH'S contention that he could not make an informed decision

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4. continued

"During the trial, the court Reporter announced that she had some kittens and puppies to give away. All the jurors and Mr. Beck, Plaintiffs' attorney were present in the Courtroom, at the time of the announcement." "Mr. Beck, the court reporter, myself and four or five other jurors, walked to the parking lot together, to see the puppies and kittens. The Court Reporter's mother had brought only one puppy. (Appendix 409: 9-16).

Mr. Beck announced that he would take the puppy as it was going to the pound the next day. (R.T. p. 409.)

(Neither Appellant nor his attorney knew during trial of the Court Reporter's announcement. Trial Appendix pp. 423-426.)

In chambers, Mr. Beck and the Court Reporter, a Court employee, both falsely indicated that the jurors just happened to come up because they saw the puppy. (R.T. pp. 677-678.)

regarding an admonition without knowing of the communications.

Secrecy and improper communication with jurors are both so contrary to any idea of due process as to compel a strict standard of review -- a standard missing in California.

C. **California Has Inadequate Standards for Determining When an Admonition Will (or Would Have) Cured the Harm Resulting from Misconduct.**

California law assumes that jurors can and will obey an admonition to ignore improper evidence or statements of counsel. Whitfield v. Roth (1974) 10 Cal.3d 874, 893.

In the usual situation someone else is being criticized by an admonition --

the jurors are not being criticized.

However, in the case at bench, the jurors were also at fault in the incidents of improper contact with counsel. An admonition could have been seen as criticizm of their actions and so increased the prejudice -- not eliminated it.

It is not an even tradeoff -- plaintiffs' attorney gets to socialize with jurors while defendant's attorney gets to subject the jurors to criticizm.

III.

THIS COURT MAY REVIEW AN OPINION OF A STATE APPELLATE COURT WHICH IGNORES ESTABLISHED JUDICIAL NORMS.

This Court's Rule 10 states as an important consideration for granting a writ of certiorari, the need to supervise Courts of Appeal (Federal) which vary significantly from judicial norms. This standard applies also to State Court of Appeal under Supreme Court Rule 10(2).

A. The California Court of Appeal Misstated Controlling Law (Law Correctly Described in the Same Panel's Published Opinion) & Misstated Undisputed Facts in Order to Uphold the Verdict.

See, Section III, Reasons for Granting the Writ.

CONCLUSION

The Writ of Certiorari should be granted.

Respectfully submitted,

David A. Smyth

DAVID A. SMYTH

APPENDIX A

APPENDIX A

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

HAYMOND GIPSON AND MARLENE GIPSON,

Plaintiffs and Respondents,

v.

ANDREW EDWARD SMYTH,

Defendant and Appellant.

No. B051803

(LASC C617959)

COURT OF APPEAL-
SECOND DISTRICT
FILED
AUG 27, 1991
ROBERT N. WILSON
CLERK

Appeal from a judgment of the Superior Court of Los Angeles County. Betty Jo Sheldon and G. Keith Wisot, Judges. Affirmed but reversed as to prejudgment interest.

David Ashley Smyth and Warren L. Brown for Defendant and Appellant.

Thomas E. Beck for Plaintiffs and Respondents.

Appellant, Andrew Edward Smyth, appeals from a judgment after a jury trial in an action for professional malpractice and fraud. We find none of appellant's numerous contentions on appeal reveal reversible error and affirm.

FACTS AND PROCEEDINGS BELOW

In 1978 respondents, Mr. and Mrs. Gipson, purchased a small home at 955 West 43rd Street for $30,000. Great Western Bank (Bank) provided a $28,000 30-year term mortgage. Respondents' monthly mortgage payment was about $300. Mr. Gipson immediately began refurbishing the house by replacing the roof, exterminating termites, painting and other work. What Mr. Gipson could not do himself, he contracted out to local firms.

In 1983 Mrs. Gipson devoted most of her time to raising their five minor children and pursuing a masters' degree. Mr. Gipson was a 64-year-old truck driver with a third grade education who began experiencing temporary layoffs.

Apparently because of the layoffs, respondents began to miss a few mortgage payments. The skipped mortgage payments led to a pro. per. Chapter 7 bankruptcy filing. Mr. Gipson testified he thought bankruptcy was a way to consolidate his then outstanding bills.

The Gipsons hired attorney Shirley Knopf who converted the Chapter 7 to a Chapter 13 wage-earner bankruptcy plan. Chapter 13 was the more appropriate bankruptcy plan because it provided the only way to keep their house. Chapter 13 was also more appropriate because the Gipsons intended to pay their bills and Mr. Gipson expected to return to work. However, by November 1983, Mr. Gipson had not returned to work and had failed to keep mortgage payments current. Attorney Knopf entered into a stipulation with the bank on behalf of the Gipsons, agreeing the Gipsons could have time to catch up on the arrearage but if any future payment was not paid on time, the bank could immediately commence foreclosure proceedings.

This stipulation was not entered as a final judgment until five months later in March 1984. In May 1984 the bank requested an ex parte hearing on its application for relief from the stay pursuant to the Knopf stipulation because the Gipsons had not kept mortgage payments current. Mr. Gipson testified he mailed payments directly to the bank during this period but the bank always returned them. For some reason Mr. Gipson was unaware mortgage payments by a Chapter 13 debtor should be made through the bankruptcy attorney instead.

The Gipsons wanted attorney Knopf to represent them at the hearing but her fees were too high. The Gipsons located the Smyth & Smyth law firm in a newspaper ad. One day before the hearing appellant agreed to represent the Gipsons at the hearing for a fee of $310. Appellant did not inquire if Mr. Gipson was then employed or whether he had plans to sell or refinance the house. Mr. Gipson testified appellant scanned through the file Mr. Gipson had brought with him and did not say too much during the short meeting except that he would take care of it.

The next day, the Gipsons were in bankruptcy court. Smyth did not appear himself. A part-time associate appeared as appellant's representative. This associate did not seek a continuance to familiarize himself with the case. Nor did he file an opposition to the bank's motion for relief from the stay based on irregularities in the stipulation. For example, the Gipsons never signed the stipulation. Nor was there any record or evidence the Gipsons had understood and consented to be bound by the stipulation. Also, from the filing of the stipulation only two months had elapsed -- arguably an inadequate time period to demonstrate a course of conduct. The associate said very little at the hearing, suggesting he knew very little of the Gipsons' case or their current finances as they related to the issues before the court. The court granted the bank's motion for relief from the stay eliminating any impediment to foreclosure.

After the hearing the associate told the Gipsons it was "too late" and to call appellant and have it taken care of. Mr. Gipson had no idea what had taken place at the hearing.

Two days later, Mr. Gipson talked to appellant who urged him to come into the office and sign papers to file another Chapter 13 petition. At this meeting appellant did not explain the significance of what occurred at the hearing. He did not explain the significance and effect of the prior stipulation nor did he explain the bank now had a legal right to take their house. Mr. Gipson paid the additional attorney fees and signed the Chapter 13 petition, apparently relying on appellant's assertion he would "take care of things."

In filing this second Chapter 13 petition, appellant never inquired of Mr. Gipson's employment status or financial condition. instead he merely copied the numbers from the schedules filed with the first Chapter 13 petition. Appellant never explained to Mr. Gipson that in order to get court confirmation of a Chapter 13 plan he would have to make every mortgage payment. Mortgage payments were missed and this Chapter 13 petition was dismissed in December 1984.

Appellant filed two more Chapter 13 petitions. As each prior petition was dismissed, appellant would file a new petition, each time requesting an additional fee. Although the time period between the original and fourth and final filing was approximately two years, and interest and penalties had accumulated on the mortgage arrearages, appellant filed each petition using the outdated, erroneous data from the original petition without inquiring about or reassessing the Gipsons' financial condition.

Mr. Gipson felt appellant was straightening out the problems with the bank by filing the petitions for bankruptcy.

The effect of the serial filings was to impose automatic stays from foreclosure pending confirmation or dismissal of a plan. When the bank received notice of the fourth petition it noticed a hearing for relief from the automatic stay to be heard June 12, 1985. Because appellant was particularly concerned sanctions may be imposed against him at this hearing -- because serial filings within short periods of time are prohibited by the bankruptcy code -- he requested Mr. Gipson bring in a check representing four mortgage payments to demonstrate good faith compliance with the bankruptcy plan. Mr. Gipson, however, was told not to come to the hearing the next day and miss any more work.

Yet another associate of appellant's appeared at the hearing on June 12, 1985. Counsel for the bank asserted the Gipsons' serial bankruptcy filings were an abuse of the system and an underhanded effort by the Gipsons to thwart the bank's right to foreclose. This associate made no argument in rebuttal except to mention he had a check representing four mortgage payments from the Gipsons. The court agreed there was abuse. The court did not impose sanctions but did grant the bank's motion for relief from the automatic stay.

Again, no one explained to the Gipsons what occurred at the hearing. They were not informed the bank again had an immediate right to foreclose on their home. Nor were they warned very little time remained before the bank could legally notice the sale of the house and remove them from their home.

Four days later this associate and Mr. Gipson appeared before the same bankruptcy judge to confirm the last bankruptcy plan. No mention was made of the court's ruling four days earlier and the court confirmed the plan. Because he had never received an explanation of the ramifications of the court's prior ruling, Mr. Gipson felt happy and relieved all the matters concerning his home were now taken care of by the court's approval of a plan.

Notwithstanding the fact the bank now owned the house and could evict them at any time, appellant encouraged the Gipsons to continue making mortgage payments through his law firm on behalf of the bank. Appellant continued to accept these payments even after the bank sent a notice of sale, a notice to quit, an unlawful detainer complaint and an eviction effort by the marshal accompanied by a locksmith. The marshal did not complete the first eviction attempt because Mr. Gipson asserted there had to be some mistake as he had a confirmed bankruptcy plan.

There was uncontroverted evidence every time Mr. Gipson received a legal notice or document concerning his bankruptcies or house, Mr. Gipson would immediately bring it to appellant's office. Mr. Gipson testified after every one of these discussions concerning the notices appellant said he would take care of it. Appellant testified he still believed he could find some solution to each crisis. For example, appellant testified he took mortgage payments from Mr. Gipson even after the automatic stay was lifted with the intention of at some point forwarding them on to the bank in the hopes the bank would slip up, cash one of them and therefore nullify the foreclosure sale. However, by November 1984 Mr. Gipson realized appellant had not sent these payments on to the bank but was instead accumulating them in a file. At Mr. Gipson's urging, appellant immediately sent the checks on to the bank. After several unsuccessful attempts to contact appellant by telephone, the bank returned the checks because, as owner, there was no outstanding loan of the Gipsons' to apply the amount to.

While painting his house on November 25, 1985 the marshal and locksmith again arrived and ordered the family to vacate in 30 minutes. All Mr.

and Mrs. Gipson and their five children were able to carry with them was some clothing.

Mr. Gipson immediately went to appellant's office but no one would speak or meet with him. He also sought information from the marshal's office and bankruptcy trustee. The trustee ultimately referred him to other attorneys for advice.

Following the eviction Mr. Gipson lived in Compton with his oldest son. Mrs. Gipson and the other children lived with her mother in Carson. The family was not reunited until September 1986 when they found a rental unit large enough to accommodate the entire family.

Because of the eviction the Gipsons lost almost all of their furniture, appliances and personal effects that were in the house. They were also paying nearly twice the amount in rent they had been paying on the mortgage for the house.

The Gipsons brought suit for professional negligence and for fraud against appellant. They also brought suit for conspiracy to defraud creditors and to set aside fraudulent conveyances against appellant and several of his family members. The trial was bifurcated to reserve the third and fourth causes of action until trial of the malpractice and fraud action. These later causes of action were eventually settled.

Trial was to a jury. The jury found appellant negligent and awarded $50,000 in damages. The jury also found appellant had fraudulently concealed material facts from the Gipsons and awarded $100,000 in damages as well as $150,000 in punitive damages.

Appellant filed post trial motions for new trial and for a judgment notwithstanding the verdict. After extensive briefing and argument the trial court denied both motions. Appellant appeals from the adverse judgment entered against him.

DISCUSSION

"A judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error. (See Walling v. Kimball (1941) 17 Cal.2d 364, 373 ....)" (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal (SS) 268, p. 277.) Even "where the evidence is in conflict, the appellate court will not disturb the verdict of the jury or the findings of the trial court. The presumption being in favor of the judgment..., the court must consider the evidence in the light most favorable to the prevailing party, giving him the benefit of every reasonable inference, and resolving conflicts in support of the judgment." (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal (SS)278, P. 289.)

Appellant contends reversible error occurred at virtually every stage of the trial. With the above principles in mind, we will address as many of his contentions as the circumstances warrant.

I. THERE WAS SUBSTANTIAL EVIDENCE TO SUSTAIN THE JURY'S FINDING OF FRAUD.

Appellant contends the jury's finding of fraud cannot stand because the Gipsons presented "no evidence on any of the elements of fraud under any theory." Specifically, appellant contends respondent failed to present any evidence of intent or scienter, causation or of a duty to disclose.

The jury was instructed on several theories of fraud, all of which were supported by the evidence. They were instructed on intentional misrepresentation (BAJI 12.31); concealment (BAJI 12.35); nondisclosure of known facts (BAJI 12.36); active concealment of known facts (BAJI 12.37); promise without intent to perform (BAJI

12.40); and negligent misrepresentation (BAJI 12.45).

The jury answered yes to an interrogatory in the special jury verdict which asked "Did defendant, ANDREW SMYTH, fraudulently conceal a material fact from the Plaintiff[s]?" Thus we can assume the jury found appellant liable on the fraud cause of action under the theory of concealment.

" 'When a jury's factual determination is attacked on the ground that here is no substantial evidence to sustain it, the power of the appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support that determination. Where, as here, two or more inferences can reasonably be deducted from the facts, a reviewing court is without power to substitute its deduction for those of the trier of fact. It is of no consequence that the trier of fact believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion. [Citation.]' " Enriquez v. Smyth (1985) 173 Cal.App.3d 691, 697; citing Stark v. City of Los Angeles (1985) 168 Cal.App.3d 276, 284-285.)

Elements of concealment are: "1) The defendant must have concealed or suppressed a material fact; 2) The defendant must have been under a duty to disclose the fact to the plaintiff; 3) The defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff; 4) The plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact; 5) and, finally, as a result of the concealment or suppression of the fact, plaintiff must have sustained damage." (BAJI 12.35.)

The evidence supports a finding appellant concealed several material facts from the Gipsons. We need only touch upon a few of them here.

There was uncontroverted testimony appellant accepted the Gipsons as clients and agreed to represent them at a hearing on the bank's motion for relief from the stay with only a minimal understanding of the Gipsons' circumstances. It is also uncontroverted the associate substituting for appellant knew virtually nothing about the Gipsons' case and asserted no defenses at that critical hearing. As an expert in bankruptcy testified, these defenses appeared meritorious yet were forever lost by waiving them at that hearing. The net result of the initial hearing was enforcement of the stipulated judgment giving the bank the immediate right to the Gipsons' home.

Mr. Gipson testified the hearing was very short, no one spoke to him and he understood nothing of what occurred. Mr. Gipson testified appellant never explained the seriousness and significance of that hearing or reasonable alternatives to the inevitable result of loss of the house through foreclosure. Appellant never explained it was just a matter of time before he would lose his house. Instead appellant told Mr. Gipson he would take care of it.

The fact you no longer own your home and may be evicted at any moment must be considered a material fact by any standard.

The lawyer/client relationship is a fiduciary relationship which carries with it a duty to disclose material facts that arise from the purposes for that relationship. (See e.g., Terry v. Bender (1956) 143 Cal.App.2d 198; Barbara A. v. John G. (1983) 145 Cal.App.3d 369; Tri-Growth Center City, Ltd. v. Silldorf, Burdman, Duignan & Eisenberg (1989) 216 Cal.App.3d 1139, 1150 ["A fiduciary or confidential relationship can arise when confidence is reposed by persons in the integrity of others, and if the latter voluntarily accept or assume to accept the confidence, they cannot act so as to take advantage of the others' interests without their knowledge ox consent."].) Here appellant had a duty to disclose to the Gipsons entry of judgment on and enforcement of the stipulation virtually foreclosed any alternative to eventual loss of the house unless they took quick steps to either refinance and pay off the loan to the bank, or to sell the house and capture whatever equity had accumulated in the house.

Appellant did not advise the Gipsons to take these necessary steps nor did he explain their dire circumstances. Instead to apparently cover up the fact he had lost whatever real opportunity that existed to challenge the stipulation, he misled them into believing he could "take care of" the situation by refiling for Chapter 13.

There was also evidence appellant intentionally concealed or suppressed the fact loss of the house was now inevitable absent a sale or refinance. By refiling for bankruptcy appellant could continue to accept fees from the Gipsons as well as secure additional payment through a confirmed plan if he was successful in getting a bankruptcy plan confirmed. By filing for bankruptcy over and over again, appellant could postpone the inevitable foreclosure of the Gipsons' house. By postponing foreclosure appellant could also postpone the Gipsons' eventual discovery he had misled them into believing he could find a way to save their home. Postponement also prevented the Gipsons from discovering he had also failed to advise them how to recover the equity in their home even if the bank had to foreclose.

Mr. Gipson testified appellant never spent more than a few minutes talking with him and never explained the loss of his house was imminent unless quick action was taken to either refinance or sell the house. Instead of informing the Gipsons filing serial Chapter 13 bankruptcies was a futile gesture after the bank secured authority to enforce the stipulation, he led them to believe he had legal maneuvers he could employ to save their house. Had appellant informed the Gipsons his legal theories were at best extreme long shots based on a novel combination and reinterpretation of legal precedents from other jurisdictions, it is highly unlikely the Gipsons would have been willing to risk their only substantial asset on such a legal maneuver.

However the Gipsons were not informed of the risks appellant was taking with their home and instead relied on his judgment and assurances he would take care of things. They trusted him so completely, they even made several months' worth of mortgage payments to him after the notice of sale, complaint for eviction and visit by the marshal. Mr. Gipson would not have been painting his house on the day his family was actually evicted if he had not been assured appellant would manage to handle the matter.

As a result of the Gipsons' reliance on appellant's legal skills and advice, Mr. Gipson did not know unemployed persons were ineligible to file for Chapter 13 in any event. He was not informed the serial filings were futile gestures after the bank became owner of the house under the stipulation. The Gipsons never attempted to save the equity in their home through sale or refinance trusting in appellant to find an alternative as promised. Because all the evidence in the case indicated Mr. Gipson did do everything appellant told him he should do, there is every reason to believe the Gipsons would have followed advice to sell or refinance had they been presented with hard facts and real alternatives from the start. The jury expressly found the

Gipsons' reliance on appellant's advice or lack thereof caused their harm. The jury's finding is amply supported by the evidence.

As a result of this reliance, the Gipsons lost their home, the accumulated equity in their home and personal effects that remained in their home when they were ordered to leave.

In sum, there is sufficient evidence to support the jury's finding appellant fraudulently concealed material facts.

II. EVIDENCE AT TRIAL WAS PROPERLY ADMITTED.

A. The Testimony of a Former Employee was Properly Admitted.

Appellant testified he spent time with all his clients despite the high volume of his bankruptcy practice. He also testified he devoted considerable time to respondents' case because it was much more complicated than most and required more legal research. This testimony directly contradicted Mr. Gipson's testimony appellant rarely spent any time with him and never explained anything to him. Credibility of the two primary witnesses became a critical issue in the case.

In a motion in limine, appellant objected to any testimony from a former employee, Phil Frascenella. Gipsons' counsel explained he called the former employee as a witness to testify to appellant's office procedure and to the appellant's reputation for truth and veracity. Appellant's counsel objected to the testimony as impermissible evidence of acts of wrongdoing. This evidence, counsel complained, would only tend to prove appellant "negligent because he has a character trait of being negligent." In rebuttal, Gipsons' counsel specifically noted testimony on appellant's reputation for truth and veracity was expressly authorized by Evidence Code section 780, subdivision (e) to test the credibility of a witness. Counsel also noted Evidence Code section 1101, subdivision (b) permits character evidence "to prove some fact ... other than his ... disposition to commit such an act." In this case respondents' counsel asserted the testimony was relevant to proving appellant's intent to defraud the Gipsons.

The trial court permitted the former employee to testify. Mr. Frascenella testified appellant's office was very busy. The telephones constantly rang and people were always waiting in the lobby. Mr. Frascenella's responsibilities included handling much of appellant's overflow work. He testified appellant spent between 15 to 20 minutes with each new client. If a client owed more than he owned, appellant put the client into a Chapter 7 bankruptcy. If the client owned a house he wanted to keep, he was put into a Chapter 13 bankruptcy. At this initial meeting, appellant would have the client sign bankruptcy petitions in blank and request they bring in supporting documentation, if necessary, at a later meeting.

Mr. Frascenella further testified appellant had very little contact with his clients after the petition was filed. The former employee also recalled fielding many client complaints. Mr. Frascenella claimed he left appellant's employ because appellant did not want to pay him. Finally, based on his familiarity with appellant as his employer, Mr. Frascenella stated his opinion appellant was not a truthful and trustworthy person.

The reputation testimony was clearly relevant evidence under Evidence Code section 780, subdivision (e) as tending in reason to prove or disprove the truthfulness of appellant's testimony.

The evidence of client complaints also is relevant to prove intent to defraud. Because Mr. Frascenella could not properly testify to the content of those conversations, the evidence does not directly prove how appellant intended to defraud each of those complaining clients. However, Evidence Code section 1101, subdivision (b) does not only permit the best or most powerful evidence to prove a certain fact. To be admissible under this section evidence need only be relevant, i.e., evidence which has a tendency in logic to prove or disprove motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident or absence of consent in a prosecution for an unlawful sexual act.

Because evidence of client complaints does tend to prove a course of conduct demonstrating appellant's intent to defraud, the evidence was properly admitted.

We find no error.

B. Mr. Gipson's Testimony Giving His Opinion of the Value of His House and the Bankruptcy Expert's Opinion Concerning the Standard of Care for a Bankruptcy Specialist was Properly Admitted.

Mr. Gipson was asked the value of his home. He responded other houses in his neighborhood sold for $88,000 and $90,000 and did not look as good as his. Appellant did not object to this testimony but now asserts "opinions of value do not have any probative value' and urges this court to ignore this testimony as incompetent. Appellant cites Kitchel v. Acree (1963) 216 Cal.App.2d 119, in support of this proposition. A closer reading however, demonstrates Kitchel v. Acree supports exactly the opposite view. "It is well established that the owner of property may testify as to its value. (19

Cal.Jur.2d, Evidence, (SS) 373, p. 101.) It is also the law that having expressed an opinion as to the value of his property, the owner should be permitted to give his reasons for such opinion, since it is the general rule that an opinion is worth no more than the reasons on which it is based." (Id. at p. 124.)

It appears Mr. Gipson's opinion testimony was not only properly admitted but was also probative evidence of the house's actual value. We find no error.

A bankruptcy expert testified a reasonably competent bankruptcy attorney would have known the only options the Gipsons had to save the equity in their home after the bank acquired the right to enforce the stipulation, were either sale of the home or refinance to pay off the bank to prevent foreclosure under the stipulation. Erroneously believing an appellate court re-weighs the evidence in reviewing a judgment, appellant urges this court to disregard the expert's testimony because he admitted he was not an expert in either real estate or refinancing and did not affirmatively state these options were in fact available to the Gipsons.

Appellant's complaint is directed more to the weight to be given such testimony and not its admissibility. It is the function of the jury, and not an appellate court, to weigh evidence. The jury was instructed on BAJI 2.42 which informs the jury an expert is to give an opinion based upon assumptions. However, "If any fact assumed in such a question has not been established by the evidence, you should determine the effect of that omission upon the value of an opinion based on that fact." Presumably the jury gave the expert testimony its proper weight. An appellate court need only find substantial evidence supports the judgment.

III. THERE WAS NO INSTRUCTIONAL ERROR REQUIRING REVERSAL.

Appellant asserts numerous instructional errors. We note, that with one exception, appellant failed to object to any of the instructions given below and is therefore deemed to have waived any objection on appeal. We also note, with this one exception, appellant expressly approved the final form of the instructions as given upon inquiry by the trial court after discussion and argument lasting over several days concerning the proper instructions.

"The existence of instructional error alone is insufficient to overturn a jury verdict. A defendant must also show that the error was prejudicial (Code Civ. Proc., (SS) 475) and resulted in a 'miscarriage of justice' (Cal. Const., art. VI, (SS) 13). '"'[A] 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.'" ' (Pool v. City of Oakland (1986) 42 Cal.3d 1051, 1069; citing Seaman's Direct Buying Service, Inc. v. Standard Oil Co. (1984) 36 Cal.3d 752, 770.) We do not find any of the alleged instructional errors requires reversal.

A. BAJI 2.60 Defining Respondents' Burden of Proof Did Not Confuse the Jury.

BAJI 2.60 told the jury it was respondents' burden to prove by a preponderance of the evidence every fact necessary to establish one of the alternative theories of fraud. Appellant objected to the instruction because he was concerned the jury might be confused and believe they only needed to find fraud by a preponderance of the evidence to award punitive damages.

A compromise was eventually worked out whereby the alternative theories of fraud were listed generally to be proven by a preponderance of the evidence. Immediately after that instruction the court gave the instruction the Gipsons had the burden of proving all of the facts necessary to establish entitlement to punitive damages by clear and convincing evidence. After much discussion and argument, and upon inquiry by the court, appellant expressly approved the burden of proof instruction.

Now appellant claims the burden of proof instruction is deficient because it fails to recite every element required to prove each theory of fraud by a preponderance of the evidence.

Even if it would have been preferable to have given a more complete burden of proof instruction, any error was probably cured by the detail and comprehensiveness of the other instructions on fraud. (Jentick v. Pacific Gas & Elec. Co. (1941) 18 Cal.2d

117, 121 ["Questionable and incomplete instructions may be rendered innocuous if it is clear, when they are read and considered with the other instructions, that the jury was not misled."].)

In any event it is not reasonably possible the jury was misled into believing it was respondents' burden to prove a general theory of fraud without also having to prove by a preponderance of the evidence the specific elements constituting the particular theory of fraud.

Separate instructions on each of the various theories of fraud listed the specific elements necessary for a finding of fraud. These instructions were preceded by an introductory instruction on fraud and deceit which instructed the jury each of the essential elements of the fraud theory must be proved to recover damages. (BAJI 12.30.) If intent or scienter was an element of that particular theory of fraud, the instruction informed the jury it had to find intent or scienter. (See, e.g., BAJI 12.31 intentional misrepresentation; BAJI 12.35 concealment; BAJI 12.37 active concealment of known facts; BAJI 12.40 promise without intent to perform.) When a duty to disclose was required as an element of a particular theory of fraud, the specific instruction so informed the jury. (See, e.g., BAJI 12.35 concealment; BAJI 12.36 nondisclosure of known facts.)

Thus, there is no reason to believe the jury was misled into believing every element of a given fraud theory did not need to be proved by a preponderance of the evidence because BAJI 2.60 was less detailed than it could have been.

Even if the burden of proof instruction could be said to have been deficient in some way, it is clear the jury was not confused or misled about their duty to find every element before answering yes to whether appellant had defrauded the Gipsons. During deliberations the jury requested a clarification of the fraud instructions which had been submitted to them without identifying headings. The jury made it very clear they did not want either a re-reading of the instructions or of anyone's testimony. They simply wanted to know whether in order to find fraud they needed to find and agree on every element of every fraud instruction. The court informed the jury the instructions were alternative theories of fraud. To find on any one of the theories the jury had to agree every element of that theory was proven.

Thus, the court's clarification cured whatever perceived deficiency that may have existed in the burden of proof instruction by reiterating every element of a given theory of fraud had to be proved by the facts presented at trial.(1/)

B. The Court Had No Sua Sponte Duty to Give BAJI 12.57.

Appellant contends the court had a sua sponte duty to instruct on the proper measure of damages for fraud. Specifically, he contends the court should have given BAJI 12.57 which explains the benefit of the bargain is the proper measure of damages for some fraudulently induced financial transactions.

(1/) Appellant contends the court's clarification erroneously described BAJI 12.36 [nondisclosure of known facts by one with a duty to disclose] and BAJI 12.37 (active concealment of known facts] as "alternate" theories of fraud comprised of their own elements when in fact the instructions do not set forth all the necessary elements. This argument might have some force if it could be determined or even assumed the jury relied on these theories in finding fraud. The evidence is to the contrary.

The jury was instructed not all instructions were applicable and to disregard any they did not find applied to the facts as found. (BAJI 15.22.) It appears the jury did as instructed. In the special verdict form the jury found appellant "fraudulently concealed material facts". The jury also found because critical facts were concealed, the Gipsons "reasonably did or refrained from doing acts to their detriment". The jury also found appellant's conduct sufficiently despicable, oppressive, malicious and intentional to make an award of punitive damages. (See section IV, A, infra.) Thus any argument the jury "might have taken the path of least resistance" and found fraud under a theory requiring no intent or reliance is belied by the actions the jury actually did take in this case.

The benefit of the bargain measure of damages is the "difference between the actual value of that which the plaintiff received and the value which it would have had if the fraudulent representation had been true." (BAJI 12.57.) Appellant cites this court to no authority to support his contention the trial court in this case had a duty to give this instruction and therefore this contention need not be considered. (In re Elizabeth G. (1988) 205 Cal.App.3d 1327, 1332, fn. 3 ["On appeal points which are not supported by legal argument and citation of authorities may be deemed to have been waived."].)

In any event, the use note to BAJI 12.57 indicates the instruction would have been completely inapplicable in a case involving nondisclosure of material facts and concealment. The use note states: "This instruction applies only to fraudulently induced transactions other than the purchase, sale or exchange of property, real or personal ... and to fraud in the purchase, sale or exchange of property, real or personal, where the defrauding party stands in a fiduciary relationship to the defrauded party." (BAJI 12.57 (7th ed. 1986) Use Note, p. 34.)

This is not a case of a fraudulently induced financial transaction. Nor does the case involve the purchase, sale or exchange of property.

It was not error to refuse this instruction.

C. It was Not Error to Refuse BAJI 12.77.

Initially Gipsons' counsel wanted the court to instruct on negligent or intentional infliction of emotional distress.

In discussing the propriety of these

instructions, appellant requested the court to give BAJI 12.77 which defines the intentional and reckless conduct required for a finding of intentional infliction of emotional distress.

The request for instructions on infliction of emotional distress was later withdrawn. Appellant withdrew his request for the defining instruction as well until he learned the court intended to give part of BAJI 12.85 which allows the jury to award damages for emotional distress resulting from a substantial financial injury which was proximately caused by a defendant's intentional or reckless wrongful conduct. (BAJI 12.85.)

Appellant suggests it was inappropriate to instruct the jury it could award damages for non-economic injury in an attorney malpractice action without first instructing the jury it had to find intentional, reckless or outrageous conduct. Appellant relies on Quezada v. Hart (1977) 67 Cal.App.3d 754 for this proposition. In that case, the court analyzed the appropriate circumstances under which a plaintiff may properly be awarded damages for emotional distress in an action for malpractice against an attorney. "California courts have limited emotional suffering damages to cases involving either physical impact and injury to plaintiff or intentional wrongdoing by defendant. Damages for emotional suffering are allowed when the tortfeasor's conduct, although negligent as a matter of law, contains elements of intentional malfeasance or bad faith." (Id. at p. 761.) In that case the court found emotional distress damages inappropriate because the defendant's negligent acts involved "no affirmative wrongdoing, but merely carelessness and inattention to duty..." (_Id_. at p. 763.)

Quezada provides little support for the propriety of this instruction. BAJI 12.77 does not, for example, direct the jury to first find intentional acts _or_ acts demonstrating bad faith before awarding damages for emotional distress. Instead the instruction defines the mental state of one who intentionally or recklessly inflicts emotional distress and is instead appropriate in a case in which that cause of action is separately and specifically alleged. (See e.g., _Spackman_ v. _Good_ (1966) 245 Cal.App.2d 518, 828.)

Because there was no claim for

intentional or negligent infliction of emotional distress, the instruction may have only confused and misled the jurors. Consequently, it was not error to refuse the instruction.

D. Appellant Was Not Prejudiced by the Instructions on Pain and Suffering and Emotional Distress Caused by Substantial Financial Injury.

Appellant contends it was prejudicial error to give both an instruction on pain and suffering as compensatory damages as well as an instruction on damages for emotional harm caused by a substantial financial loss. (BAJI 14.00, 14.85 as amended.) Appellant claims giving both of these instructions was error because of the risk of double recovery for the same injury.

In support of his position

appellant cites Huff v. Tracy (1976) 57 Cal.App.3d 939 in which the court held a trial court may not instruct on loss of enjoyment of life in addition to or distinct from general damages. Huff v. Tracy, supra, was a personal injury action arising from an automobile collision. The trial court gave a standard jury instruction on pain and suffering as well as the plaintiff's requested instruction on loss of enjoyment of life based on the plaintiff's loss of taste in his damaged tongue.

The Court of Appeal found the two instructions effectively communicated the same information. The risk of giving both was the danger of double recovery for the identical injury where the jurors were told they could award damages for the pain and suffering and award additional amounts for the plaintiff's loss of enjoyment of life. The court, however, found the instruction harmless error because the total amount of damages awarded by the jury was "well within the bounds of reason" given the extent of plaintiff's injuries. (Id. at p. 944.)

BAJI 14.00 instructed the jury they could award non-economic damages for "pain, suffering, emotional distress, humiliation and injury to reputation". BAJI 14.13 and 12.85 as amended, informed the jury the Gipsons could be awarded damages for any emotional distress resulting from a substantial financial injury caused by the appellant's intentional or reckless wrongful conduct which included "pain, discomfort, fears, anxiety and other mental and emotional distress." Thus, the two instructions imparted nearly the same information to the jury.

In this case the jury was not told it could award an additional and separate amount for emotional distress caused by a substantial financial loss in addition to the amount awarded for pain and suffering.

Nor is there any indication the jury in fact made a double award. The $50,000 awarded on the negligence count reasonably approximates the Gipsons' actual economic losses based on the loss of equity in their home, their personal property, additional attorneys' fees incurred for appellant and the bank's attorneys, penalties, etc. The $100,000 awarded on the fraud count is more likely than not what the jury deemed the appropriate amount to compensate the Gipsons for their mental and emotional distress and pain and suffering combined. There is no indication the award is twice as large as it might have been in the absence of a single instruction on pain and suffering (see section IV, C, infra.).

Thus, if the duplicative instructions were error at all, we find the error harmless.

IV. THE AWARD OF PUNITIVE DAMAGES WAS PROPER.

A. There is no Evidence the Jury Awarded Punitive Damages Based on Fraud Without Also Finding Appellant Intended to

Defraud Respondents.

As explained in section III A, supra, the trial court explained to the jury they could find fraud under any one of the alternative theories given provided every element under that theory was proved. Appellant contends the award of punitive damages must be set aside because it is possible the jury found fraud under one of the alternate theories of fraud which does not require a specific finding of intent to defraud. (See section III A, fn. 1, supra.)

This is an inadequate showing of affirmative error requiring reversal. (Walling v. Kimball, supra, 17 Cal.2d 364, 373.) It is also highly improbable the jury could not have found intent to defraud based on the evidence in the case.

Most of the alternative theories of fraud presented to the jury required a finding appellant intended to misrepresent, conceal or suppress material facts. moreover, the instruction on punitive damages directed the jury such damages could only be awarded if they found by clear and convincing evidence appellant "was guilty of [oppression] [fraud] [or] [malice] in the conduct on which you base your finding of liability." (BAJI 14.71) Fraud is defined in that instruction as "an *intentional* misrepresentation, deceit, or concealment of a material fact known to the defendant with the *intention* on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." (BAJI 14.71, emphasis added.) Thus, even if some of the fraud instructions did not specify an intent to defraud, the jury's award of punitive damages eliminates any possibility the jury relied on those instructions.

Jury verdicts have often cured defects or errors in instructions. (See, e.g., Kramer v. Ferguson (1964) 230 Cal.App.2d 237, 246 [erroneous instruction on qualified privilege cured by jury award of punitive damages. "Such awards carry with them by necessary implication a finding that these defendants acted with malice. The presence of such malice destroys the qualified privilege."]; see also, Pool v. City of Oakland (1986) 42 Cal.3d 1051 [issue of reasonable cause to arrest improperly given to jury cured by jury by properly resolving issue based on contradictory evidence.].)

In sum, appellant has presented no evidence, substantial or otherwise, that indicates the jury failed to follow the court's instructions by awarding punitive damages without also finding appellant intended to defraud respondents.

Indeed, there is no evidence at all the jury even relied on the ground of fraud in awarding punitive damages. The jury would have been warranted in finding appellant acted despicably with a "willful and conscious disregard for the rights of others" in that he knew the "probable dangerous consequences of his conduct yet deliberately failed to avoid the consequences" (failure to inform respondents serial filing of bankruptcies would not assist them in any way while not advising them to immediately take steps to save the equity in their house).

Alternatively, the jury could have found appellant's acts oppressive by subjecting the Gipsons to "cruel and unjust hardship in conscious disregard of that person's rights" (leading them on he was taking care of things and accepting mortgage payments knowing it was just a matter of time before they would lose their house).

In sum, it is not reasonably possible the jury awarded punitive damages without also finding appellant guilty of some intentional wrongdoing.

B. The Punitive Damage Award is Appropriate Despite the Inadequacy of Evidence of Appellant's

Wealth.

In reliance on Dumas v. Stocker (1989) 213 Cal.App.3d 1262, appellant contends the award of punitive damages cannot stand in the absence of evidence of his net worth. We note the appellate courts had been divided on this issue. (See e.g., Vossler v. Richards Manufacturing Co. (1983) 143 Cal.App.3d 952.) However, the California Supreme Court has resolved this issue in Adams v. Murakami (S003530 filed 8-15-910) and determined a plaintiff must prove a defendant's "financial condition" to recover punitive damages. The purposes behind the new rule are to provide meaningful appellate review of a punitive damage award and to ensure a given award is not larger than necessary to punish and deter a particular defendant.

However, this argument confuses the real issue in this case. In appellant's trial brief he specifically requested "no evidence of any of defendants' finances be admitted until the jury makes a finding of fraud or malice." Having expressly waived any requirement of evidence of wealth before an award of punitive damages, appellant cannot now be heard to complain the award cannot stand in the absence of such evidence.

The supreme court in Adams v. Murakami (S03530, filed 8-15-91) did not address the issue of the affect of a stipulation precluding evidence of a defendant's wealth. Although there may be an ambiguity, it would appear a defendant could waive the right to have a plaintiff present evidence of his financial condition where the purpose of the rule is to provide meaningful appellate review of an award for the defendant's benefit in any event. Moreover, it would be very unfair in this case to now require the plaintiffs to present such evidence where they relied upon the defendant's offer to stipulate before trial.

The defendant having waived any requirement of evidence concerning his financial condition, we find no error.

C. Appellant Was Not Prejudiced by Respondents' Counsel's Misstatements Concerning Appellant's Earnings.

On cross-examination appellant testified he had a very large volume bankruptcy business. He stated that for several years he had handled at least 1,000 bankruptcies a year of all chapters of bankruptcy. Appellant also testified he charged respondents $310 on three different occasions and expected to receive an additional $550 or so from the confirmed plan in bankruptcy. Thus, based on his own testimony appellant collected roughly $1,500 for each of the 1,000 or so bankruptcy filings he handled each year. This represents approximate gross annual earnings of $1,500,000. Appellant also testified he tended to make more money handling a bankruptcy with a confirmed plan.

In closing argument Gipsons' counsel urged the jury to award a large punitive damage award. "Mr. Smyth, now gets $1,500 for every one of the six or seven bankruptcies he takes in every day. It's a lot of money, ladies and gentlemen. This is several thousand dollars a day, tens of thousands of dollars a month. And if you want to make him remember the Gipsons, to make sure that he either goes out and hires other help or changes his methods of operation so he doesn't cause the harm caused to these people, then award the $750,000. Make them understand."

Appellant did not object to this argument but now claims telling the jury appellant made $10,500 a day is false information and probably encouraged the jurors to award a high amount of punitive damages.

First, we note respondents' counsel did not tell the jury appellant made $10,500 a day. Moreover, the jury was instructed according to BAJI 14.62 which warned that arguments of counsel must not considered by them as evidence of reasonable compensation for damages.

It is true, the evidence showed appellant filed approximately 1,000 bankruptcies a year -- or three or four a day -- not six or seven per day. Thus counsel may have misspoke or miscalculated. But, based on appellant's own testimony, he did earn several thousand dollars a day and tens of thousands of dollars a month. Thus, most of counsel's argument was a truthful comment on the evidence.

Nor does it appear appellant was prejudiced in any way by counsel's argument. Based on appellant's own testimony concerning his annual earnings, Gipsons' counsel requested the jury to return a punitive damage award of $350,000 and a total third of the award requested.(2/)

Thus appellant either waived any error by his failure to object or was not prejudiced by counsel's misstatement.

V. ANY DEFICIENCY IN THE JURY VERDICT FORM WAS INVITED ERROR.

(2/) Appellant also contends the punitive damage award was excessive. In support of his argument he submits a declaration purporting to state a net worth of $600,000. This evidence was not presented at trial and cannot be properly considered.

"An award for punitive damages will be reversed or reduced 'upon a showing that it is so grossly disproportionate to any reasonable view of the evidence as to raise a strong presumption that it is based upon passion or prejudice."' (Wollersheim v. Church of Scientology (1989) 212 Cal.App.3d 872, 905 citing Koyer v. McComber (1938) 12 Cal.2d 175, 182.) In this case it appears the jury was neither influenced by passion or prejudice nor by argument of counsel. The jury seems to have demonstrated calm and restraint in determining damages. The punitive damage award is not grossly disproportionate to the evidence concerning the Gipsons' damages and they awarded considerably less than was requested. (Cf., Wollersheim v. Church of Scientology, supra, 212 Cal.App.3d 872.) Also, the award is only a fraction of appellant's annual gross sales according to his own testimony. on this record it has not been demonstrated the punitive damage award is excessive.

Appellant contends the special verdict form is fatally defective because the jury was not asked to make a specific finding of intent to deceive, duty to disclose or scienter.

Appellant also contends the format of the verdict form allowed the jury to give a double recovery.

Initially Gipsons' counsel prepared a special verdict form comprised of detailed interrogatories concerning each element of the fraud action. This verdict form only provided one interrogatory for damages.

Appellant objected to the verdict form as too long and too complicated because of all the different questions. At the court's suggestion appellant submitted his own special verdict form, which after minor revision was adopted and used by the jury.

Appellant wanted the jury to have the option of finding only negligence and awarding only economic damages for simple negligence without additional damages for emotional distress caused by intentional or bad faith conduct in connection with the malpractice. If the jury found no negligence they were told to stop and not go on to the interrogatories on fraud. Appellant drafted the special verdict in this format firmly believing the only fraud involved was concealment of the negligence, and that if the jury found no negligence they certainly could not find fraud. Also, confident the jury would not find more than simple negligence, appellant's form separately inquired as to the damages sustained by the negligence alone.

Appellant's solution for simplifying the interrogatories on the fraud theory was to ask one general question: "Did defendant, ANDREW SMYTH, fraudulently conceal a material fact from the Plaintiff[s]?" If the jury responded in the affirmative they were then asked what amount of compensatory damages to award for the fraudulent concealment.

If the special verdict form was error it was error induced by appellant's own affirmative acts and may not be considered on appeal. "Where a party by conduct induces the commission of error, he is estopped from asserting it as a ground for reversal. This application of the estoppel principle is generally known as the doctrine of invited error." (9 Witkin (3d ed. 1985) Appeal, (SS) 301, p. 313.; see also, Abbott v. Cavalli (1931) 114 Cal.App. 379, 383 ["One whose conduct induces or invites the commission of error by the trial court is estopped afterwards from taking advantage of such error."].)

The principle of invited error has been applied in many different situations, including challenges to findings which the party himself proposed (see e.g., Kraus v. Willow Park Public Golf Course (1977) 73 Cal.App.3d 354, 374); challenges to admissibility of evidence the complaining party introduced (see, e.g., Zarafonitis v. Yellow Cab Co. (1932) 127 Cal.App. 607, 609); and, challenges to an instruction substantially similar to one offered by complaining party (see e.g. Mozzetti v.

Brisbane (1977) 67 Cal.App.3d 565, 573.) Another example of invited error is when the failure to submit an issue to the jury is brought about by the appellant's objection to its submission. (Estate of Novotny (1928) 94 Cal.App. 782, 790.)

In this case appellant prevented the jury from making a finding on each element of fraud by insisting on using the "simpler, less complicated" verdict form he drafted. Appellant also drafted the verdict form providing for two separate entries for compensatory damages. Thus any error in the verdict form was invited error and appellant is estopped from asserting such error on appeal.

VI. APPELLANT RECEIVED A FAIR TRIAL DESPITE THE SEVERAL ALLEGED INSTANCES OF ATTORNEY MISCONDUCT.

A. Appellant Waived the

Alleged Misconduct of Suggesting an $85,000 Appraisal Existed on the Gipsons' Home.

The value of the Gipsons' home was a critical and contested issue in the case. Based on opinion testimony and appraisals for tax, insurance, lending, foreclosure or assessing damages, the value of the Gipsons' house ranged from $3,000 to $90,000. The only consistent evidence concerning the value of the house was the fact the sales price of the house was $30,000 when the Gipsons purchased it and was $58,500 when the bank later sold it at foreclosure.

Thus appellant complains he was prejudiced when respondents' counsel referred to a "non-existent" appraisal for $85,000. Appellant claims the appraisal does not exist because he is familiar with the records in the case and there is no appraisal for $85,000 in the records. Gipsons' counsel claims it was an exhibit attached to deposition testimony to which the bankruptcy expert testified on the stand.

On cross-examination of appellant's expert appraiser, counsel asked if he was aware the Gipson's home had been appraised at $85,000 for property tax purposes. The witness was then shown some document which the appraiser stated showed an amount of $66,000.

Appellant explains he did not object to this questioning because of tactical reasons and because the expert's answer favored appellant in any event. Now, however, he claims the suggestion of an $85,000 appraisal, which he believes does not exist in the record, was prejudicial attorney misconduct.

In support of his allegation of attorney misconduct appellant cites to City of Los Angeles v. Decker (1977) 18 Cal.3d 860. Decker was an action for eminent domain involving property condemned for airport construction. The condemnee presented evidence the highest and best use for the property was commercial, and in particular, an airport parking lot. The city attorney attacked the condemnee's claim and emphasized testimony in the record to the contrary. Less than three weeks after entry of judgment the city airport board approved a large parking facility on property which included the condemnee's.

Based on evidence the city attorney knew in advance the property was to be used as an airport parking lot, the supreme court found the city attorney committed misconduct and reversed the trial court's denial of a new trial.

Decker is distinguishable. Appellant has presented no evidence respondents' counsel intentionally falsified evidence of an $85,000 appraisal for property tax purposes. Nor has he demonstrated his case was prejudiced by this possibly erroneous appraisal. In Decker the condemnee's entire case rested on the information withheld and falsified by the city attorney, unlike in this case where it appears the jury was not controlled or influenced by any one piece of evidence.

In any event, it appears appellant may have waived any claim of attorney misconduct. A claim of attorney misconduct is waived by the complaining party's failure to object and request an admonition. (Sabella v. Southern Pac. Co. (1969) 70 Cal.2d 311, 319.) In cases of attorney misconduct it is vital the trial court have the opportunity to immediately rectify any alleged wrongdoing and admonish the jury at a time when the instruction can have a beneficial effect. Claims of error after it is too late to give a curative instruction are ineffective and are unfair to the court and parties alike.

On this record it is impossible to be certain if the appraisal existed or not. Assuming it did not and further assuming counsel's reference to it constituted misconduct, it appears appellant consciously waived any objection to counsel's questions for tactical reasons.(3/)

B. Counsel's Improper Conduct with Jurors Was Not Prejudicial.

During a break in the trial the court reporter announced she was giving away puppies and if anyone was interested they should meet in the parking lot at lunch hour. Gipsons' counsel was interested in adopting a puppy and went to the parking lot to inspect the puppies with the court reporter. While discussing the puppies with the court reporter and her mother who had brought the puppy, several jurors approached.

Appellant's counsel saw Gipsons' counsel with the puppy among the jurors and immediately yelled at him to stop.

The trial court held a hearing on appellant's motion for mistrial, or in the alternative to dismiss the entire jury panel because of this incident. Based on the testimony of appellant's counsel, Gipsons' counsel and the court reporter, the trial court denied both motions.

(3/) In closing argument appellant's counsel told the jury Gipsons' counsel had lied and tried to fool them and used the $85,000 appraisal as an example. In rebuttal argument Gipsons' counsel stated:

"One thing that pops into mind is the aspersion that was cast on me about an $85,000 tax assessment. You and I both know that when Mr. Harriton was on that stand, he was referring to a document in the deposition, and that document existed. He testified to it, so I didn't make that up."

Appellant's counsel objected and requested a meeting in chambers which the court denied.

It is unclear why an in camera meeting was requested. In any event, it came too late. The request was not the equivalent of an objection and request the jury be admonished. Thus any attorney misconduct may be deemed waived. (Sabella v. Southern Pac. Co., supra, 70 Cal.2d 311, 319.)

Everyone agreed the whole episode lasted about four minutes. Gipsons' counsel stated "as I was standing there talking to both the reporter and her mother and examining the animal, there were jurors present. There was not a single word spoken among us at any time concerning anything to do with this case of any nature. It was -- I was very circumspect about what was said at all, and the entire conversation, if there was really what you might characterize as a conversation, were comments related to the animal and nothing more." The court reporter testified "As Mr. Beck said, he walked out of the courtroom, and my mother was holding the puppy. He walked over with me, and part of the jury followed, and while we were standing there, he was asking me about the puppy. A few jurors commented the puppy was really cute. Mr. Beck never at any time directed any of his comments directly to any jurors, and nor did the jurors make any comments to Mr. Beck, and that was it."

The trial court suggested bringing the jurors in for questioning and admonishment. Appellant rejected this suggestion concerned the jury may react negatively.

After the jury verdict appellant filed a motion for new trial based in part on allegations of improper juror contact. Accompanying this motion were juror affidavits describing the puppy incident. Although the jurors confirm counsel was in the parking lot and one juror apparently overheard a comment made by counsel about the puppy, none of the jurors state Gipsons' counsel communicated with them in any way. Appellant's motion for new trial was also denied.

As noted above, "Generally a claim of misconduct is entitled to no consideration on appeal unless the record shows a timely and proper objection and a request that the jury be admonished. ... 'It is only in extreme cases that the court, when acting promptly and speaking clearly and directly on the subject, cannot, by instructing the jury to disregard such matters, correct the impropriety of the act of counsel and remove any effect his conduct or remarks would otherwise have."' (Horn v. Atchison T. & S.F.Ry. Co. (1964) 61 Cal.2d 602, 610; internal citations deleted.) "Only misconduct so prejudicial that an admonishment would be ineffective excuses the failure to request such admonishment." (Whitfield v. Roth (1974) 10 Cal.3d 874, 892.)

In Whitfield v. Roth, supra, 10 Cal.3d 874, one of the defense counsel passed out cigars and candy to the jurors to celebrate the birth of a new son and to apologize for delaying the trial for one day. Plaintiff's counsel found out about the gifts the day after the incident but initially decided he would not object in exchange for admission of some evidence without defense objection. However, a day later plaintiff's counsel objected and moved for a mistrial. This motion was denied. This incident was also the basis of plaintiff's motion for a new trial which was denied as well.

The Supreme Court found defense counsel's gifts to the jury improper and constituted misconduct even thought it may have resulted only from bad judgment. (Id. at p. 892.) However, on the facts of that case the Supreme Court was satisfied "any effect it might have had on the jury could have been entirely removed by an admonishing instruction."

The court gave weight to the trial court's findings the gesture, although unthinking and inappropriate in a courtroom, was deemed a customary gesture in everyday life. Secondly, the gifts were extended to everyone in the courtroom and were not made in secret. (Id. at p. 893.) Also significant was the trial court's conclusion of no prejudicial effect from the improper gifts. Plaintiff's counsel regarded the incident with minimal concern and at no time requested the jury be admonished. Based on these facts the court concluded "These circumstances make it clear that at most plaintiff was entitled to an admonishing instruction." (Ibid.) The court affirmed the judgment entered on the jury verdict.

In this case, unlike in Whitfield

v. Roth, supra, counsel did not initiate contact with the jurors. Nor is there any evidence counsel directly communicated with any of the jurors. on the other hand, counsel obviously demonstrated poor judgment by placing himself in a situation where jurors might be present. If this is not misconduct, counsel's presence in this group at least risked giving the appearance of impropriety.

Appellant did object to counsel's perceived interaction with the jurors. However, he did not request, and indeed specifically rejected the trial court's suggestion, an admonishment to the jury would be appropriate to dispel any potential effect of prejudice.

As in Whitfield v. Roth, supra, we are satisfied any effect the incident may have had on the jury could have been cured by admonishment. The invitation to inspect the puppies for adoption was made to everyone present in the courtroom. The invitation was not made in secret. Nor was inspection of the puppy done in secret. The incident occurred in the parking lot with many people present, including a few jurors. The trial court was satisfied counsel never initiated any conduct or conversation with the jurors and found the whole incident innocuous and nonprejudicial. In order to eliminate any appearance of impropriety, the trial court offered to question and admonish the jurors. Appellant, however, consciously and deliberately rejected this opportunity.

Under the circumstances of this

case, we find any prejudicial effect could have been cured by admonishment.(4/)

VII. THERE WAS NO PREJUDICIAL JUROR MISCONDUCT REQUIRING REVERSAL.

In his motion for new trial appellant made several allegations of prejudicial juror misconduct. He renews those

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(4/) In his brief on appeal appellant asserts additional incidents of alleged attorney misconduct. These alleged incidents were considered by the trial court in ruling on appellant's motion for new trial. After a review of the entire record, and assuming these incidents did occur, we agree with the trial court they did not prevent appellant from having a fair trial. (Tapia v. Barker (1984) 160 Cal.App.3d 761, 765.)

allegations on appeal. "In reviewing the denial of a motion for new trial based on jury misconduct, the appellate court 'has a constitutional obligation (Cal. Const., art. VI, (SS) 13) to review the entire record, including the evidence, and to determine independently whether the act of misconduct, it if occurred, prevented the complaining party from having a fair trial."' (Tapia v. Barker (1984) 160 Cal.App.3d 761, 765 citing Andrews v. County of Orange (1982) 130 Cal.App.3d 944, 955.)

A. There is no Evidence Jurors Agreed to Increase the Award to Cover Attorneys' Fees at Trial and on Appeal.

Appellant contends the damage award must be reversed because jurors increased the damage award to compensate for attorneys' fees. In support of his contention appellant relies on Krouse v. Graham (1977) 19 Cal.3d 59. In Krouse, the plaintiffs brought suit for wrongful death against the driver of a truck that struck the Krouse's parked car killing Mrs. Krouse and injuring Mr. Krouse and their neighbor. The jury found for the plaintiffs and awarded them substantial sums. The defendant moved for a new trial based on juror affidavits $30,000 had been added to the neighbor's award to cover her attorneys' fees. Plaintiff's motion to strike the affidavits was granted and the motion for new trial denied.

The Supreme Court noted the affidavits could be construed as admissible under Evidence Code section 1150 if the jurors actually discussed the subject of attorneys' fees and specifically agreed to increase the verdicts to include such fees. "Such discussion and agreement would appear to constitute matters objectively verifiable, subject to corroboration, and thus conduct which would lie within the scope of section 1150." (Id. at p. 81.) On the other hand, the affidavits could be construed as reflecting only the mental processes of the jurors who "considered" and "commented" on the subject of attorneys' fees. Under that construction the affidavits would be inadmissible evidence of the juror's subjective reasoning processes. However, because the juror affidavits agreed the neighbor's damage award was increased $30,000 to cover her attorneys' fees, the court found the statements sufficiently material the trial court should have considered the juror affidavits in ruling on the defendant's motion for new trial.

"Generally, it is clear, attorneys' fees are not recoverable in personal injury or wrongful death actions [Citations]. An express agreement by the jurors to include such fees in their verdict, or extensive discussion evidencing an implied agreement to that effect, constitutes misconduct requiring reversal. [Citations.] A plaintiff's obligation to pay attorneys' fees is so commonly understood by most jurors, however, that it would be undesirable to require that a verdict be set aside merely because some of the jurors admitted that they privately considered the matter of attorneys' fees in reaching their verdict." (Ibid.)

The court affirmed the award subject to the trial court's reconsideration of the defendant's motion for new trial based on the juror affidavits.

Thus, the key element in finding juror misconduct is whether jurors agreed as a group, either expressly or implicitly through evidence of comprehensive discussions, to increase the damage award by a certain amount.

The admissibility of the juror statements in this case concerning attorneys' fees are not exactly free from doubt. They were, however, apparently considered by the trial court over the Gipsons' objection in ruling on appellant's motion for new trial. Assuming the affidavits present objectively verifiable evidence of juror statements and discussions, it is clear at least some jurors "discussed" and "decided" the amount Gipsons' counsel might receive in attorneys' fees.

The affidavits, however, do not demonstrate an express agreement by the jurors to include such fees in their verdict. Nor do these affidavits indicate discussions about the inclusion of attorneys' fees was so pervasive there was an implied agreement to that effect. In fact, the issue of attorneys' fees does not appear in all of the juror affidavits submitted. one of the jurors stated he personally added between 20-30% attorneys' fees to the damage award. This would indicate there was no agreement for any specific amount nor for automatic inclusion of attorneys' fees. As Krouse points out, it is not prejudicial juror misconduct for individual jurors to consider what part of the award might go to the attorneys in fees and adjust their recommended award accordingly. Addition of attorneys' fees by individual jurors is insufficient "to require that a verdict be set aside." (Krouse v. Graham, supra, at p. 81.)

Concerning awarding extra in the event of appeal, some juror affidavits stated: "The jury and myself felt a high award should be made to insure that the Plaintiffs would receive some money even if there was an appeal."

What the jurors "felt" concerning their award to cover costs of appeal is clearly inadmissible evidence of their subjective reasoning process. (Evid. Code, (SS) 1150; People v. Sutter (1982)

134 Cal.App.3d 806, 819 [declaration which purports to relate what he or she "felt" is incompetent evidence to impeach a verdict]; People v. Flores (1979) 92 Cal.App.3d 461, 468-469 [declaration by one juror as to what others jurors "felt" is likewise incompetent evidence to impeach a verdict.].)

While the trial court did not expressly state it would not consider these particular statements, we assume the court also rejected these statements in ruling on appellant's motion for new trial.

"[W]hile we are obliged to make an independent review of the record, [citations), we nevertheless 'should accord great deference to [the] trial judge's evaluation of the prejudicial effect of jury misconduct.' [Citations.]" (Akers v. Kelley Co., Inc. (1985) 173 Cal.App.3d 633, 657.) We agree with the trial court's ruling the affidavits did not demonstrate prejudicial jury misconduct requiring reversal.

B. There Is No Evidence the Punitive Damage Award Was Arrived at by Chance.

The rule regarding proper and improper quotient verdicts was summarized by Our Supreme Court in Will v. Southern Pacific Co. (1941) 18 Cal.2d 468. In that case the supreme court reversed an order granting a new trial based on juror affidavits stating they arrived at the damage award by adding up the different amounts voted and then dividing that amount by the number of jurors voting for damages. The court noted the original amount arrived at by this calculation was $26,000 which was later modified to $25,000 by a majority of the jurors voting for damages.

In reversing, the court stated: "When jurors agree to vote for a verdict in an amount to be calculated by an averaging of the sums being voted by some or all of them, it constitutes one arrived at by chance which should be set aside. [Citations.] But it is not improper for jurors to calculate an average amount as a basis for discussion if there is a later consideration of the amount and a vote upon it, even if they agree upon that amount." (Id. at pp. 477-478.)

This pronouncement of the rule was further elaborated on in Monroe v. Lashus (1959) 170 Cal.App.2d 1. There the Court of Appeal rejected an allegation the damage award was arrived at by chance where the jurors averaged the amount of damages. "Whether a verdict is the result of chance depends upon the point of time during the deliberations that the jurors agree to be bound by the quotient verdict. If the jurors agree to be bound by the result obtained by averaging the sums each juror has in advance of knowing what the amount would be, the verdict is the result of chance. If the jurors simply average the sums, learn the amount thereof, and then each decides upon that amount as his verdict it cannot be said that such verdict is the result of chance. [Citations.] Thus, if a jury adopts a quotient verdict by independent action after the amount is made known to them, such approval subsequent to averaging the sums constitutes a valid verdict."

With these principles in mind we review the juror affidavit on which this allegation is based. Juror Hommedieu stated: "Punitive damages were computed as follows: We added up the amounts each juror had submitted for punitive damages and then eliminating the high and low figures, we then divided the result by number of juror [sic] (minus high and low) who had voted for punitive damages."

This is not evidence of a quotient verdict. The juror does not state the entire jury agreed to be bound in advance by whatever figure arrived at by this calculation. Absent evidence of any such an agreement, or of when the jury did this averaging, the punitive damage award cannot be challenged on the ground it was an improper chance verdict.

C. The Jury Did Not Agree to Award the Gipsons an Amount Sufficient to Purchase a House at Today's Prices.

Appellant asserts the judgment must be reversed because the jurors determined the verdict based on the amount it would take to replace the Gipsons' house at "today's prices". He contends this is jury misconduct because no evidence was introduced of what a similar house would cost at the time of trial.

Juror affidavits belie this contention. Some of the juror affidavits do say they "discussed" how much it would cost to buy a similar house at today's prices. Other juror affidavits reveal the juror struck this portion of the prepared affidavit and by interlineation stated they discussed what the Gipsons might have received if they had sold their home when they first filed for bankruptcy.

Still other affidavits do not even mention discussing house replacement prices.

First, we note the cost of housing is a matter within the common experience of most jurors. Thus we cannot say these discussions improperly introduced new and material evidence. (See e.g., Locksley v. Ungureanu (1986) 178 Cal.App.3d 457.)

Second, there is no indication the jurors agreed their verdict should reflect the amount it would take to purchase a similar house at today's prices or at any other time. Again, evidence of how individual jurors independently determine what a proper award should be is insufficient to impeach a verdict. (Krouse v. Graham, supra, 19 Cal.3d 59.)

VIII. RESPONDENTS ARE NOT ENTITLED TO PREJUDGMENT INTEREST.

Prior to trial the Gipsons made a statutory offer to compromise pursuant to Code of Civil Procedure Section 998 of $90,000. This offer was intended to settle the two causes of action tried in this action as well the remaining two causes of action against appellant and some of his relatives to set aside fraudulent conveyances and for conspiracy to defraud creditors. The defendants did not accept the Gipsons' offer.

When a plaintiff makes a statutory offer to compromise, Civil Code section 3291 authorizes pretrial interest on the difference between the offer and the judgment from the date of the rejected offer, in the event the plaintiff obtains a more favorable judgment at trial.

Based on these provisions, the trial court awarded the Gipsons pretrial interest on $210,000 from the date of the offer, the amount awarded at trial in excess of their $90,000 settlement offer.

Appellant contends an award of prejudgment interest pursuant to Civil Code section 3291 is only appropriate in an action based on personal injury. We agree.

In _Morin_ v. _ABA Recovery Service,_

Inc. (1987) 195 Cal.App.3d 200, the plaintiff brought suit for wrongful possession of personal property, negligence, negligent and intentional infliction of emotional distress. Prior to trial the plaintiff made a statutory offer to compromise for $24,000 under Code of Civil Procedure section 998. The defendants allowed this offer to expire.

Later the defendants also presented an offer to settle for $40,000 which the plaintiff rejected. After arbitration and a trial de novo, plaintiff was awarded $67,500 on a general verdict, including $27,500 compensatory damages and $40,000 punitive damages.

Believing prejudgment interest discretionary, the trial court denied the plaintiff's request for prejudgment interest on the amount of the award that exceeded the rejected settlement offer.

The Court of Appeal reversed and remanded for further proceedings. The court noted the statutory language authorizing prejudgment interest was mandatory and found the trial court had no discretion to refuse an award under the circumstances. on the other hand, the court noted the statute only authorized prejudgment interest on that portion of the damage award for personal injury. Because it was impossible to determine what portion of the general verdict represented damages for personal injury, and thus entitlement to prejudgment interest, the court remanded the matter for further proceedings.

This holding was taken one step further by the California Supreme Court in Gourley v. State Farm Mut. Auto. Ins.

Co. (1991) 53 Cal.3d 121. In Gourley, the plaintiff was injured when the car in which she was a passenger was hit by an uninsured drunk driver. She then made a claim under her uninsured motorist coverage in her insurance policy. State Farm made a settlement offer of $20,000, an amount it believed the plaintiff would have suffered had she been wearing a seat belt. Plaintiff demanded the policy limit of $100,000 based on the probability of permanent disability.

The matter was then submitted to arbitration. Before conclusion of the proceedings, Gourley reduced her demand to $60,000 and State Farm responded with an offer of $25,000. The arbitrator concluded Gourley was not negligent in failing to wear a seat beat and awarded her $88,000.

Gourley later sued State Farm for breach of the implied covenant of good faith and fair dealing and violation of Insurance Code section 790.03 and requested punitive damages and general damages for mental and emotional distress. Gourley also made a statutory offer to compromise the judgment of $249,099 which was rejected.

The jury returned a general verdict for plaintiff for $15,765 in actual damages and $1,576,500 in punitive damages. The trial court awarded $300,000 in prejudgment interest on the total amount of the verdict based on Gourley's offer to compromise for $249,099 pursuant to Code of Civil Procedure section 998.

The Court of Appeal affirmed but the Supreme Court reversed insofar as it upheld the interest award.

The Supreme Court noted the legislative purpose behind Civil Code section 3291 "is to provide a statutory incentive to settle personal injury litigation where plaintiff has been physically as well as economically impaired, and thus it has been considered inapplicable to contractual disputes, business-tort losses and arbitration proceedings. [Citations.)" (Id. at p. 126.) Consequently, the court held prejudgment interest was not available in that action "because such actions are brought primarily to recover economic loss caused by the tortious interference with a property right, and any damages recovered for actual personal injury, including emotional distress, are incidental to the award of economic damages. Accordingly, we conclude that an action for breach of the implied covenant of good faith and fair dealing is not an action 'to recover damages for personal injury' under section 3291." (Id. at p. 123; emphasis in original.)

Gourley is not directly controlling in a case involving emotional distress caused by a substantial financial loss due to attorney malpractice and fraud. However, its underlying principle is applicable, i.e., prejudgment interest is not available in a case where the primary loss is an economic one and where pain and suffering or emotional distress is suffered as an incident of that loss. Because this action was not "brought to recover damages for personal injury" but was brought primarily to recover financial loss, the prejudgment interest award must be reversed.(5/)

DISPOSITION

We reverse the award of prejudgment interest and affirm the judgment in all other respects. Respondents to recover their costs of appeal.

NOT TO BE PUBLISHED

JOHNSON, J.

We concur:

LILLIE, P.J.

WOODS (Fred), J.

(5./) Appellant's other arguments are either clearly without merit or are unsupported by authority and will therefore not be considered. "Where a point is merely asserted by the appellant's counsel without any argument of or authority for the proposition, it is deemed to be without foundation and requires no discussion by the reviewing court. [Citation.]" (Jimmy Swaggart Ministries v. State Bd. of Equalization (1988) 204 Cal..App.3d 1269, 1294 citing Atchley v. City of Fresno (1984) 151 Cal.App.3d 635, 647.)

APPENDIX B

APPENDIX B

IN THE COURT OF APPEAL OF THE STATE
OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

Ruling Due 9/27/91
Opinion by Jusice Johnson
Answer Due 9-20-91
L-W

HAYMOND GIPSON and MARLENE GIPSON, Plaintiffs/Respondents,	APP. CASE NO. 2CIVB051803
vs.	LASC CASE NO. C 617959
ANDREW EDWARD SMYTH, Defendant/Appellant.	Denied/9-23-91 Signatures

APPELLANT'S PETITION FOR REHEARING
On Appeal from the Judgment of the
Superior Court of California, Los Angeles
County, The Honorable Betty Jo Sheldon,
Judge Retired
The Honorable G. Keith Wisot

Court of Appeal-Second Dist.
FILED
SEP 10 1991
ROBERT W. WILSON, Clerk
D.P. POTTER, Deputy Clerk

DAVID ASHLEY SMYTH
Attorney at Law
Suite 1200
Los Angeles, CA 90036
(213) 933-8401

APPENDIX C

APPENDIX C

Second Appellate District, Division Seven,
No. B051803 S023190

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

HAYMOND GIPSON, et al., Respondents	SUPREME COURT FILED NOV. 13 1991 ROBERT WANDRUFF Clerk
v.	
ANDREW EDWARD SMYTH, Appellant	Deputy

Appellant's petition for review DENIED.

LUCAS
Chief Justice